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Should Federalism Shield Corruption?—Mail Fraud, State Law and Post-Lopez Analysis

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SHOULD FEDERALISM SHIELD CORRUPTION?—MAIL FRAUD, STATE LAW AND POST-*LOPEZ* ANALYSIS

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I

INTRODUCTION—PROTECTION THROUGH PROSECUTION?

There is a view of state and local governments as ethically-challenged backwaters,[1] veritable swamps of corruption in need of the ultimate federal tutelage: protection through prosecution. Whether or not the view is accurate, the prosecutions abound.[2] Many metropolitan newspapers have chronicled the federal pursuit of errant state and local officials.[3] The pursuit is certain to continue. In the post-Watergate period, the Justice Department has made political corruption at all levels of government a top priority.[4] A vigorous federal presence in

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1 *See, e.g.*, Michael Kinsley, *The Withering Away of the States*, NEW REPUBLIC, March 28, 1981, at 17, 21 (listing examples of state and local government corruption). Mr. Kinsley states that we need not "do anything so drastic as abolishing the states. They could remain as reservoirs of sentiment and employers of last resort for people's brothers-in-law." *Id.* at 21. For a recent academic treatment reflecting a similar perspective, see generally Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994) (rejecting federalism as a norm of governance).

2 *See* Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 154 (1994) ("As of December 31, 1990, 1561 state and local officials awaited trial.").

3 Brian C. Mooney, *Crux of Federal Probe: What Is Corruption?*, BOSTON GLOBE, July 22, 1995, at 1 (analyzing federal investigation of the Speaker of the Massachusetts House of Representatives); John Sullivan, *Mayor's Aide in Newark Is Indicted*, N.Y. TIMES, Jan. 26, 1996, at B1 (reporting federal indictment of top aide to Mayor of Newark, New Jersey).

4 *See* Moohr, *supra* note 2, at 154 ("For the past twenty years, the federal government has tried to secure good government by prosecuting state and local public officials for public corruption.").

this area—including prosecution of state and local officials—is widely supported by observers of the federal criminal justice system.[5]

There is, however, a fundamental tension between these prosecutions and one of the important intellectual, political, and judicial currents of our time: the renewed interest in curbing national authority in favor of state and local power. Whether this perspective is labeled "devolution,"[6] "the new federalism,"[7] or "dual sovereignty,"[8] it is a driving force in the debate over issues as diverse as welfare reform,[9] crime control,[10] voter registration,[11] and term limits.[12] Many on the devolutionist side find constitutional support for their position not only in the original document and the Tenth Amendment,[13] but also in recent decisions of the Supreme Court, especially *United States v. Lopez*.[14]

The message of *Lopez* is that the powers of the national government are limited in fact as well as in theory. Evoking "first principles," Chief Justice Rehnquist emphasized that "[t]he Constitution creates a Federal Government of enumerated powers"[15] and posited the goal of "'a healthy balance of power between the States and the Federal Government.'"[16] The *Lopez* Court demonstrated a renewed willingness to read the Commerce Clause as containing its own internal limits.[17] An

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5 *E.g.*, G. Robert Blakey, *Federal Criminal Law: The Need, Not for Revised Constitutional Theory or New Congressional Statutes, but the Exercise of Responsible Prosecutive Discretion*, 46 HASTINGS L.J. 1175, 1206 n.67 (1995).

6 *E.g.*, Wilfred M. McClay, *A More Perfect Union? Toward a New Federalism*, COMMENTARY, Sept. 1995, at 28, 29-30 (discussing concept of devolution).

7 *E.g.*, Richard C. Reuben, *The New Federalism*, A.B.A. J., Apr. 1995, at 76.

8 *See* Kathleen M. Sullivan, Comment, *Dueling Sovereignties*: U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 78, 104 (1995) (discussing debate over role of Supreme Court "as defender of state sovereignty against federal encroachment").

9 *See, e.g.*, Kenneth B. Noble, *Welfare Revamp, Halted in Capital, Proceeds Anyway*, N.Y. TIMES, Mar. 10, 1996, at 1 (reporting state changes to welfare program while federal efforts appear stalled).

10 *See, e.g., House Refuses to Restore Crime Prevention Funds*, BOSTON GLOBE, July 27, 1995, at 16 (debate over Republican efforts to convert 1994 crime control legislation into block grant).

11 *See* Reuben, *supra* note 7, at 79 (discussing California Governor Pete Wilson's challenge to the federal "motor voter" law).

12 *See* Sullivan, *supra* note 8, at 81 (analyzing the Court's 1995 decision on term limits as "best read as a preview of the Court's response to other coming controversies over the relative reach of state and federal power").

13 *See, e.g.*, Reuben, *supra* note 7, at 76 (stating that conservatives view the Tenth Amendment as "embod[ying] the founders' promise for a nation in which the states and federal government are near-equal partners").

14 115 S. Ct. 1624 (1995).

15 *Id.* at 1626.

16 *Id.* (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

17 By "internal limits" I mean the notion that Congress's various powers, granted in Article I, section 8, are both enumerated and limited. If Congress attempts to utilize a specific enumerated power to reach a subject matter beyond the scope of that power, the Court will strike it down as exceeding that power's internal limits. This concept is particu-

important aspect of *Lopez* is that it struck down a federal criminal statute.[18] The Court stressed that "[u]nder our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'"[19] Like the gun law at issue in *Lopez*, federal prosecutions of state and local officials present a heightened risk of upsetting the "healthy balance" between the state and federal systems, albeit for different reasons. After *Lopez*, the Court is sure to examine whether the statutory authority to undertake such prosecutions is within the "limited" authority of Congress.

In this Article, I use the term "post-*Lopez* analysis" to encompass both external limits on congressional power and internal limits such as those at issue in *Lopez*. Indeed, the invocation of *Lopez* becomes an additional, somewhat symbolic, statement as to the importance of federalism. Recent decisions of the Court, as well as opinions of individual justices, represent a renewed interest in the vitality of a dual-sovereignty approach to constitutional issues. The Court has become increasingly willing to narrow[20] or strike down[21] national laws infringing upon state interests. In particular, *New York v. United States*[22] resurrects the notion of external, federalism-based limits on Congress's exercise of enumerated powers. In that case, the Court held that Congress cannot "commandeer" the regulatory authority of state legislatures.[23] To the extent that there are external limits on the national government, a federal prosecution of state officials who make and enforce state law seems a strong candidate to trigger them. A government that cannot commandeer states perhaps cannot police them either.

In this Article, I will examine the issues that federal prosecutions of state and local officials pose. The analysis focuses on prosecutions

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larly important in the context of the Commerce Clause, which the Court had previously interpreted in a seemingly unlimited fashion. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942); *see also* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 132-34 (2d. ed. 1991) (discussing "[e]nforcing enumeration as a limitation on power"). "External limits" are constraints upon congressional action that have their source in some provision or principle of the Constitution other than the power Congress seeks to exercise. *See* Sullivan, *supra* note 8, at 105-06 (discussing possible revival of external limits analysis after the Court's decision in *U.S. Term Limits Inc. v. Thornton*, 115 S. Ct. 1842 (1995)). *See generally* STONE ET AL., *supra*, at 139 (discussing distinction between internal and external limits).

18 The statute was the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q) (1994). For a discussion of the scope of federal criminal law, see *infra* Part II.

19 *Lopez*, 115 S. Ct. at 1631 n.3 (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993)).

20 *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452 (1991) (narrowing the scope of the Age Discrimination and Employment Act as applied to appointed state judges).

21 *See, e.g.*, Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996); United States v. Lopez, 115 S. Ct. 1624 (1995); New York v. United States, 505 U.S. 144 (1992).

22 505 U.S. 144 (1992).

23 *Id.* at 176 (citation omitted).

under the mail fraud statute.[24] This broad statute, prohibiting use of the mails in connection with "any scheme or artifice to defraud,"[25] has emerged as one of the federal prosecutors' major weapons in the war against political corruption.[26] The Supreme Court has already tried once to limit it,[27] relying in part on federalism grounds.[28] Congress, however, rebuffed the Court by amending the statute in an effort to make clear that it applies to state governmental matters. The amendment added to the general ban on fraud a prohibition on any "scheme or artifice to deprive another of the intangible right of honest services."[29] Read broadly, this language confers a set of federal rights to good government at the state and local level; citizens cannot be deprived of these rights by any fraud that uses the mails. In this Article, I contend that the statute in its present form raises substantial questions, especially in the post-*Lopez* environment. Constitutional and policy issues concerning the proper scope of federal criminal law—substantial ones to begin with—are particularly sensitive when the defendants are state and local officials.

Part II of the Article considers the mail fraud statute within the context of the general debate over the proper scope of federal criminal law.[30] This ongoing debate may provide impetus for re-examination of the statute, particularly given the sensitive issues that prosecutions of state officials raise. While many observers view prosecution of state and local corruption as a desirable component of federal criminal jurisdiction,[31] several justices of the Supreme Court have called for its curtailment on federalism grounds.[32] Moreover, the mail

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24 18 U.S.C. § 1341 (1994).

25 *Id.*

26 *See, e.g.*, Moohr, *supra* note 2, at 154 & n.6 (citing figures detailing extensive reliance on mail fraud statute, but also noting use of other statutes).

27 *See* McNally v. United States, 483 U.S. 350 (1987).

28 *See id.* at 360 ("Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope . . . .").

29 The Amendment provides: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508 (codified as amended at 18 U.S.C. § 1346 (1994)).

30 *See, e.g.*, Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 983-88 (1995) (discussing the effects of expanded federal criminal jurisdiction on the workload of federal courts); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1148-65 (1995) (discussing impact of the war on drugs on the federal judicial system); Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1038-47 (1995) (expressing doubt over the validity of concerns about federal judges' workload).

31 *See, e.g.*, JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 25 (1995) [hereinafter LONG RANGE PLAN]; Blakey, *supra* note 5;.

32 *See* Evans v. United States, 504 U.S. 255, 290-94 (Thomas, J., dissenting).

fraud statute has often been the object of scrutiny and criticism.[33] For example, recent court of appeals decisions reflect unease with its potentially broad scope.[34]

The question arises whether a re-examination of mail fraud would focus on constitutional or statutory issues. Parts III and IV address the former. Prior to *Lopez*, analyses of federal criminal law assumed that the basic issue of national power was settled,[35] but the premise of this Article is that all bets are off. Part III examines the question of internal limits on the mail fraud statute as an exercise of the power "[t]o establish Post Offices and Post Roads."[36] The principal argument for constitutionality is that Congress may exclude from the mail matters that it lacks the power to regulate in general.[37] One might expect *Lopez* to cast doubt upon such analysis. However, *Lopez*'s treatment of the Commerce Clause suggests that this view of the Postal Power retains its validity. To the extent that the question remains open, however, it is useful to explore alternative sources for congressional authority to enact a broad statute dealing with state and local corruption. I therefore consider the theses that the Guarantee Clause[38] is a possible source,[39] and that corruption at any level threatens the national government's own well-being.[40]

Nationalist premises like these sounded a lot more convincing prior to *Lopez* and other recent federalism decisions. Part IV, therefore, considers whether one can derive from the Court's jurisprudence federalism-based external limits on whatever national power over state and local corruption would otherwise exist. I am not suggesting a direct application of *Lopez* itself. Rather, the question is one of post-*Lopez* analysis in the broad sense and of judicial enforcement

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33 *See, e.g.*, Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435 (1995); Moohr, *supra* note 2, at 187-99; Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. REV. 223, 267-70 (1992).

34 *See* United States v. Sawyer, 85 F.3d 713, 730 (1st Cir. 1996) (requiring intent to influence official action in addition to violation of state statutes to establish honest services mail fraud); United States v. Brumley, 79 F.3d 1430, 1436-37 (5th Cir.) (holding that § 1346 is not sufficiently clear to overturn *McNally* and reinstate honest services doctrine), *reh'g en banc granted*, 91 F.3d 676 (1996).

35 *E.g.*, Blakey, *supra* note 5, at 1176 (rejecting discussion of federalization as "asking the wrong question. . . . That is a constitutional question to which we now have a fairly clear constitutional answer.").

36 U.S. CONST. art. I, § 8, cl. 7.

37 *See infra* text accompanying notes 214-23.

38 U.S. CONST. art. IV, § 4. "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."

39 *See* Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 369 (1989).

40 *See infra* text accompanying notes 117-33.

of federalism values.[41] Part IV focuses on *New York v. United States*[42] and the concept of limits on Congress's power to control state and local government. I find in *New York* and its invocations of accountability a broader ideal of substantial political autonomy for states.[43] Federal prosecutions of state officials for governing badly clash with this ideal.

My conclusion is that the inquiry into congressional power to enact the mail fraud statute in its current broad form ends in a tie. The result is a dilemma. On the one hand, federal prosecutions of state and local officials bring to justice many perpetrators of serious corruption.[44] They rest on seemingly accepted constitutional premises. On the other hand, those premises are, in the post-*Lopez* world,[45] open to reconsideration. The mail fraud statute, in particular, with its seemingly open-ended prohibition of bad government, is especially intrusive on federalism values. The policy issues are not open and shut either. Federal prosecution of state officials indicates that the state is not rectifying its own problems. Yet any long-term solution to faults within a particular political culture will probably have to come from that culture itself, notably the electorate.[46]

In Part V, I offer a possible resolution of the dilemma: state law as the primary source of any duties enforced by federal mail fraud prosecutions. The mail fraud statute, as amended in response to the Supreme Court's decision, deals with the general issue of "good government."[47] Rather than a wide-ranging federal right to good government, created and defined by the federal judiciary, why not look to the myriad of state laws governing ethics and related matters? Such laws exist in almost every state. There are other examples of federal

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41 The availability of judicial enforcement is a critical element of this analysis. Thus, the concurring opinion in *Lopez* of Justices Kennedy and O'Connor plays a central role in the post-*Lopez* environment. Justice Kennedy emphasized the need for judicial review to protect federalism and compared this role of the Court with enforcement of other "structural elements in the Constitution, separation of powers, checks and balances, [and] judicial review . . . ." United States v. Lopez, 115 S. Ct. 1624, 1637 (1995) (Kennedy, J., concurring).

42 505 U.S. 144 (1992).

43 *See* Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1570-75 (1994).

44 *See* Moohr, *supra* note 2, at 185-87 (discussing pragmatic justifications for federal prosecutions of state and local officials).

45 Part of the importance of *Lopez* is that it adds to the momentum of devolutionary developments occurring across the governmental and intellectual spectrums. Many settled matters are now open to question. Because of its prominence and sensitivity, the extensive federal role in prosecuting state and local officials is highly likely to be one of those matters.

46 Moohr, *supra* note 2, at 186.

47 18 U.S.C. § 1346 (1994) refers to "honest services" without specifying that it applies to the public sector. *See id.* at 169. However, the legislative history, although not extensive, appears to establish that Congress intended to reach misconduct by public officials. *See id.*

criminal statutes using state law to provide the governing standard, even in the anti-corruption field.[48] Close examination of the mail fraud cases reveals that federal courts often make extensive use of state law, even when they disclaim any need to refer to it. This extensive use of state law provides empirical support for the theoretical considerations advanced here. It represents a de facto recognition by the federal courts of the important federalism issues at stake.

There is, however, a serious question as to whether it is possible to read the mail fraud statute this way. Congress added the honest services language in response to *McNally v. United States*,[49] a Supreme Court decision that rested in part on federalistic premises. The Court attempted to limit mail fraud prosecutions of state and local officials;[50] Congress subsequently endorsed those prosecutions and appears to have authorized a federal standard to govern them.[51] To overcome this significant hurdle, I explore the possibilities of "clear statement" analysis. This approach to statutory construction requires Congress to use a high degree of specificity before a court will interpret a national norm as infringing upon state prerogatives. In *Gregory v. Ashcroft*,[52] the Court elaborated on the federalistic bases of this approach.[53] The Court of Appeals for the Fifth Circuit has recently held that principles of clear statement prohibit applying the honest services doctrine to state and local officials.[54] I explore a partial application, reading the statute as covering the services of state and local officials, but not providing a federal standard to define honest services. However, any invocation of the clear statement approach is vulnerable as an attempt to reinstate *McNally* after Congress overruled it. Instead, I recommend a modified "federal common law" approach: borrowing state law to give content to a federal norm.

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48 *See, e.g.*, The Travel Act, 18 U.S.C. § 1952(b)(2) (1994) (punishing, under certain circumstances, "extortion [or] bribery . . . in violation of the laws of the State in which committed . . ."). For incorporation of state law in a different context, see 18 U.S.C. § 1955 (1994) (prohibiting gambling operations in violation of state law).

49 483 U.S. 350 (1987).

50 *See id.* at 356-60.

51 *See* Moohr, *supra* note 2, at 169.

52 501 U.S. 452 (1991).

53 *See id.* at 460-61.

54 *See* United States v. Brumley, 79 F.3d 1430, 1436-37 (5th Cir.), *reh'g en banc granted*, 91 F.3d 676 (5th Cir. 1996).

II
MAIL FRAUD AND THE FEDERAL CRIMINAL LAW DEBATE—IS THIS STATUTE DIFFERENT?

A. Federal Criminal Law—The Current Debate

The first step in the analysis is to place the mail fraud statute in context. There is an extensive body of federal criminal statutes, as many as three thousand, according to an oft-cited estimate.[55] The scope of these statutes runs directly contrary to classical notions of federal law as "interstitial"[56] and of the states as occupying the primary role in criminal matters.[57] In criminal law, the current model is best described as one of concurrent jurisdiction.[58] Congress's ongoing desire to add to this *de facto* national criminal code has led two experts to state that "the trend in federal criminal laws increasingly is moving in the direction of duplication of the state criminal codes."[59] Indeed, it is possible to put aside distinctions between levels of government and to view the entire array of criminal law and administration in the United States as a single system.[60]

The development of a substantial body of federal criminal law has, however, engendered vigorous criticism, particularly among academics and judges.[61] Professor Sanford Kadish, for example, refers to "creeping and foolish federal overcriminalization."[62] Critics focus on this development's effect on the federal courts and on the federal system generally. They see a real risk that criminal cases will engulf the federal courts.[63] The resultant danger is that limited federal judicial resources will be diverted from the core functions of federal courts: constitutional adjudication, review of federal administrative agencies,

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55 *See* Beale, *supra* note 30, at 980 (citing Roger J. Miner, *Crime and Punishment in the Federal Courts*, 43 SYRACUSE L. REV. 681 (1992)).

56 *See* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 521 (4th ed. 1996) [hereinafter HART & WECHSLER].

57 *See* United States v. Lopez, 115 S. Ct. 1624, 1631 n.3 (1995).

58 *See, e.g.*, Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967, 971 (1995).

59 NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 45 (2d ed. 1993).

60 *See* Blakey, *supra* note 5, at 1176 n.4 (quoting Chief Justice William H. Rehnquist, *Welcoming Remarks: National Conference on State-Federal Judicial Relationships*, 78 VA. L. REV. 1657, 1658 (1992)). Professor Blakey views the question of how to make that system function in the most rational manner as more important than theoretical discussions of federalism. *Id.* at 1176-77.

61 *See, e.g.*, Beale, *supra* note 30; Roger J. Miner, *Federal Courts, Federal Crimes and Federalism*, 10 HARV. J.L. & PUB. POL'Y 117, 124-28 (1987).

62 Sanford H. Kadish, *Comment: The Folly of Overfederalization*, 46 HASTINGS L.J. 1247, 1248 (1995).

63 *See* Beale, *supra* note 30, at 984-88. Drug cases, in particular, can overwhelm trial dockets. *See* Brickey, *supra* note 30, at 1153-56.

interstate matters, and complex civil litigation.[64] As for federalism-based critiques, there is both a functional objection to duplicating state resources and a doctrinal concern with displacing the states' traditional primary role in criminal matters.[65] Not everyone agrees that there is a criminal caseload crisis in the federal courts,[66] or that the doctrinal questions are terribly important.[67] Even the critics of the critics, however, are willing to take a hard look at the growth of federal criminal law.[68]

The fundamental issue in the federal criminal law debate is whether it is possible to formulate general principles of federal criminal jurisdiction. Can we delineate, a priori, what cases belong in federal court? There have been numerous efforts to do so.[69] Judge Stanley Marcus has offered the following criteria for delineating federal criminal jurisdiction:

> 1) crimes against the United States itself, *i.e.*, against its treasury or its officers, or on its property;
> 2) criminal enterprises that by virtue of their scope and magnitude spill across interstate and/or international boundaries, *e.g.*, international narcotics cartels;
> 3) crime that is essentially intrastate, where the scope is so great that there is a need for federal resources and concurrent jurisdiction is justified, *e.g.*, large bank fraud cases;
> 4) enforcement of the rights of insular minorities, *e.g.*, civil rights cases;
> 5) systematic and pervasive corruption of the local system, *e.g.*, Operation Greylord, the investigation of corruption of the Cook County court system.[70]

Formulating meaningful criteria that separate effectively those cases that "belong" in the federal criminal system from those that do not is no easy task. Part of the problem is identifying federal interests that justify a partial displacement of state criminal law. In addition, as Professor Rory K. Little has noted, "[i]t may be that no language can capture the principles we want to apply, without being so generalized

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64 Beale, *supra* note 30, at 988-90.

65 *See, e.g.*, Evans v. United States, 504 U.S. 255, 290 (1992) (Thomas, J., dissenting); Beale, *supra* note 30, at 993-96.

66 *See* Little, *supra* note 30, at 1038-47.

67 *See* Blakey, *supra* note 5, at 1176-77 (criticizing symposium on federalization of crime for "asking the wrong question").

68 *See id.* at 1216-17 n.91; Little, *supra* note 30, at 1063-70.

69 *See* Renée M. Landers, *Reporter's Draft for the Working Group on the Mission of the Federal Courts*, 46 HASTINGS L.J. 1255, 1260-63, 1265 n.77 (1995) (summarizing the formulation of principles for federal criminal jurisdiction by Professor Kathleen Sullivan, Judge Stanley Marcus, and Senator Joseph R. Biden).

70 Sara Sun Beale, *Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 HASTINGS L.J. 1277, 1296 (1995).

as to be useless as a practical matter."[71] As an alternative, he recommends a "rebuttable presumption against federalization"[72] and a requirement of "demonstrated state failure"[73] before the federal criminal law can come into play.

B. Federal Criminal Law And Political Corruption—The Search For Federal Interests

It is not clear whether it is possible to formulate and apply principles of federal jurisdiction given the extensive overlapping between federal and state criminal laws that now exists.[74] What is important for purposes of this Article, however, is that even analysts with widely differing views on the scope of federal law agree that prosecutions of state and local officials for corruption belong within federal jurisdiction. Judge Marcus's fifth criterion states this explicitly,[75] as do other analyses, including the Long Range Plan for the Federal Courts of the Judicial Conference of the United States.[76] Rationales, however, differ. Some analysts apparently view corruption as analogous to violations of civil rights.[77] Others see it as a breakdown in basic governmental institutions.[78] Political corruption may represent a form of white collar crime[79] or it may be related to organized crime.[80] Both of these are fields within which an active federal role has long been accepted. Professor Little's principle of demonstrated state fail-

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71 Little, *supra* note 30, at 1077.

72 *Id.* at 1071.

73 *Id.* at 1078.

74 Professor Little raises the question of whether the federalization debate should return to "first principles" and treat all questions about the reach of federal law as open. *Id.* at 1072.

75 He refers to "systematic and pervasive corruption of the local system." Beale, *supra* note 70, at 1296. Although he cites an example of corruption in the local courts, I believe that he is referring to political corruption generally.

76 LONG RANGE PLAN, *supra* note 31, at 25. The plan lists the following as one of the types of offenses to which Congress should allocate federal criminal jurisdiction: "The proscribed activity involves serious, high-level or widespread state or local government corruption, thereby tending to undermine public confidence in the effectiveness of local prosecutors and judicial systems to deal with the matter." *Id.*

77 *See* Beale, *supra* note 70, at 1296 (listing Professor Sullivan's fourth basis for federal prosecution as "where the states are unable or unwilling to face the problem, as in the case of the enforcement of the civil rights statutes").

78 The 1995 Judicial Conference Plan for the Federal Courts invokes "public confidence in the country's system of justice." LONG RANGE PLAN, *supra* note 31, at 25. As developed below, the issue can be viewed more broadly as a matter of the public's confidence in government in general. *See infra* text accompanying notes 125-28.

79 *See* Blakey, *supra* note 5, at 1206 n.67 (treating political corruption prosecutions as an aspect of the Justice Department's white-collar enforcement activities).

80 *Cf. id.* at 1198 ("[O]rganized crime is thus the most sinister kind of crime in America. It subverts the character of American institutions as well as the character of its individuals.")).

ure will often justify federal prosecution of state and local corruption.[81]

These differing rationales reflect the general assumption that the debate over the scope of federal criminal law is one of policy only; all constitutional issues are settled.[82] In the post-*Lopez* environment, however, this view is no longer valid. Principles of state sovereignty may impose limits on prosecutions of state and local officials. Whether the issue is viewed as one of policy only, or of enforceable constitutional constraints, I think it is important and useful to identify potential federal interests. That is, what concerns of the national government can justify that government's prosecution of state officials for misconduct in office?

The civil rights context presents a clear example of the requisite interest. Whenever national law has created rights against state and local officials, or their parent bodies, logic dictates that national courts and prosecutors be available to further the federal interest in their enforcement. For example, as one analyst of federal criminal law notes, "[I]n the case of discrete minorities, the federal government has special enforcement responsibilities under the Civil War Amendments."[83] However, the same analyst writes that "[i]n the presence of discrimination *or pervasive corruption*, federal officials may no longer defer to state and local authorities, and political checks on the behavior of local officials are of doubtful value."[84] The leap from discrimination to corruption is a substantial one. Concern for disfavored classes and specific rights becomes a more generalized concern about the equitable and efficient functioning of institutions.

Indeed, the scope of the federal civil rights criminal jurisdiction is itself open to question. In the current term the Supreme Court will have a significant opportunity to clarify that scope as well as the relationship of the jurisdiction to political corruption. In *United States v. Lanier*,[85] a state judge was found guilty of misusing his position by committing sexual assaults against litigants and court employees.[86] The federal government prosecuted Judge Lanier under 18 U.S.C.

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81 *See* Little, *supra* note 30, at 1079 & nn.241-42. Professor Little would require a particularized inquiry into any proposed federal intervention because "local prosecutors have not always been ineffective in addressing local governmental corruption." *Id.* at 1079 n.242.

82 *See, e.g.*, Blakey, *supra* note 5, at 1176-77.

83 Beale, *supra* note 70, at 1298.

84 *Id.* at 1298 (emphasis added).

85 73 F.3d 1380 (6th Cir. 1996) (en banc), *cert. granted*, 116 S. Ct. 2522 (1996).

86 The facts are outlined in detail in the dissent by Judge Daughtrey. *See id.* at 1403-07 (Daughtrey, J., dissenting).

§ 242, one of the three basic civil rights criminal statutes.[87] It prohibits its deprivation "under color of any law . . . of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."[88] The theory of the prosecution was that the defendant's conduct constituted deprivation of the substantive due process right to be free from "interference with 'bodily integrity.'"[89] The Sixth Circuit Court of Appeals reviewed the conviction en banc, and, dividing sharply, reversed it.[90]

Lanier presents the Supreme Court with a host of important issues. The most obvious of these involve the scope of § 242 and the possible need to confine it to avoid problems of lack of fair warning. The Sixth Circuit majority believed that the statute cannot extend to every official act that some court might find violative of some constitutional provision.[91] This approach would raise serious vagueness questions. The court held that § 242 applies only to rights whose existence the Supreme Court has established as a general matter, and in "a factual situation fundamentally similar to the one at bar."[92] The Supreme Court may not wish to limit § 242 to this extent. The requirement of factual similarity raises a "catch-22" question of how the Supreme Court could ever establish the specific right in the first place.[93] Furthermore, the Sixth Circuit rejected the use of a "shock

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87 18 U.S.C. § 242 (1994). The other two statutes are 18 U.S.C. § 241 ("Conspiracy against rights") and 18 U.S.C. § 245 ("Federally protected activities"). *See generally* ABRAMS & BEALE, *supra* note 59, at 580-612 (discussing these statutes and the cases applying them).

88 18 U.S.C. § 242 (1994). The major case in the statute's judicial development is *Screws v. United States*, 325 U.S. 91 (1945) (plurality opinion). *Screws* held that the requirement of "under color of any law" was satisfied if the defendants were exercising their governmental authority even if the particular exercise was forbidden by state law. *Id.* at 107-11; *id.* at 114-15 (Rutledge, J., concurring); *id.* at 135 (Murphy, J., dissenting). This was an important issue in the construction of federal civil rights statutes. *See* HART AND WECHSLER, *supra* note 56, at 1105-19. *Screws* also grappled with the meaning of "rights . . . secured or protected by the Constitution." The plurality interpreted this term to apply to "a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." *Screws*, 325 U.S. at 104.

89 *Lanier*, 73 F.3d at 1388.

90 *Id.* at 1382-94. Seven judges joined in the entire opinion, with two additional judges concurring in part. Six judges dissented in whole or in part.

91 *Id.* at 1392 (stating that "[o]nly a Supreme Court decision with nationwide application can identify and make specific a right that can result in § 242 liability"). The *Lanier* court also rejected the use of lower court precedent on grounds of lack of notice and the problem of variation of federal standards among different courts. *Id.* at 1392-93.

92 *Id.* at 1393.

93 *See id.* at 1399 (Nelson, J., concurring in part and dissenting in part). Perhaps the Court could establish the right in other contexts, such as in civil suits under 42 U.S.C. § 1983. *See id.* at 1401-02 (Jones, J., dissenting) (advocating the use of § 1983 precedents). The question remains whether § 1983 decisions by lower federal courts, or even state courts, could be treated as "establishing" federal constitutional rights. In addition, the court's fact-specific formulation also runs counter to the practice of decision by analogy.

the conscience" standard,[94] which has the potential to narrow the statute's frequency of application, but may increase the risk of vagueness. One possible approach for the Court would be to limit the rights to those established by its own decisions, but not to insist on identical fact patterns.[95] This may satisfy the standard that the defendant knew or should have known that his conduct violated an established constitutional right.

Lanier may emerge as a major federalism decision, particularly if concern for state sovereignty pushes the Court toward a narrowing construction. Professors Abrams and Beale have stated that the civil rights criminal statutes are "most often used today for traditional civil rights enforcement—to prosecute criminal conduct motivated by racial or similar prejudice or involving police brutality."[96] These applications keep the statutes well within the bounds of established federal interests, as discussed above. However, the same authors note increasing use of the statutes against "official corruption," and question whether civil rights offenses will become a kind of "catch-all crime."[97] They refer to cases in which § 242 has been applied to extortion on the ground that it is a deprivation of property.[98] One possibility is that the Court will cite the potential for such broad applications as a reason for keeping § 242 within defined bounds. This message would be aimed as much at federal prosecutors as at lower courts.

One of the Court's main concerns in *Lanier* will be to prevent § 242 from becoming a general prohibition on the misuse of public office.[99] Indeed, what is striking about the case is that it presents so

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94 *Id.* at 1389 (noting the role of the jury in applying the "shock the conscience" standard and raising problem of adequacy of notice).

95 Affirmance by the Court would not mean the end of such prosecutions. They might, for example, be based on Equal Protection claims. *See id.* at 1393 (noting that "a sexual assault raising an equal protection gender discrimination claim may present an entirely different case"). *Cf.* United States v. Virginia, 116 S. Ct. 2264, 2282 (1996) (striking down state operation of a single sex educational institution). As an alternative the Court may attempt to posit some a priori limitation on the rights to which § 242 refers. Neither the constitutional nor the statutory text make this an easy task. Beyond the question of constitutional rights, there is, of course, the issue of what rights are "secured or protected" by federal statutes.

96 ABRAMS & BEALE, *supra* note 59, at 581.

97 *Id.* at 581.

98 *Id.* at 598-602. In *United States v. Senak*, 477 F.2d 304, 308-09 (7th Cir. 1973) the court of appeals approved the indictment under § 242 of a public defender who exacted money from impoverished clients. This case certainly presents the issues of generality to which Professors Abrams and Beale refer. On the other hand, the defendant in *Senak* did act under color of law and did deprive his clients of property.

99 The theme of misuse of office is found throughout § 242 jurisprudence. *See, e.g.*, Screws v. United States, 325 U.S. 91, 110 (1945) (plurality opinion) (police officers' power "misused"); *id.* at 113 (Rutledge, J., concurring) ("gross abuse of authority"); *id.* at 129 (Rutledge, J., concurring) ("abuse of their office and its function"); United States v. Lanier, 73 F.3d 1380, 1414 (6th Cir.) (Daughtrey, J., dissenting) (judge "dishonored his profession"), *cert. granted*, 116 S. Ct. 2522 (1996). At the same time, those judges con-

many of the issues that lie at the heart of the debate over whether to use the mail fraud statute to guarantee honest services: the scope of the federal criminal law, federal control over abuse of state and local offices, vagueness, narrow construction of broad statutes, the use of common law methodology in federal criminal cases, and the problem of vesting extensive discretion in federal officials when prosecution of their state and local counterparts is at issue. As a result, *Lanier* has the potential for significant repercussions far beyond its particular context.

The decision will almost certainly shed further light on the extent of the general federal interest in controlling the behavior of local officials. With respect to corruption, perhaps this interest can be analogized to a violation of the civil right to participate in the governmental process.[100] Equal access to government services should be available to all citizens. Yet corrupt governments do not serve citizens on an equal basis. Some have greater access than others.[101] Access is skewed in favor of those with the resources to wine, dine, and bribe. Democratic processes thus do not operate in an open, even-handed manner. In making this analogy, one might invoke a generalized concern for equal protection of the laws or specific issues such as denial or dilution of the franchise.[102] Fighting corruption can thus be seen as another example of the familiar federal interest in protecting individuals frozen out of the political process. The problem with the analogy is that it seems limitless. Taken to its logical extreme, the analogy implies that the national government would have an interest in intervening whenever state or local government was somehow unfair. Positing a general interest of this magnitude—as opposed to limiting the interest to the specific area of civil rights enforcement—is totally at odds with a federalistic view of states.

Alternatively, there may be a national interest in protecting national property. Title 18, § 666 of the United States Code punishes

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cerned with the potentially broad scope of § 242 are likely to invoke federalism. *See, e.g.*, *Screws*, 425 U.S. at 141-49 (dissenting opinion). *Lanier* may present the Court with a difficult choice between federalism and women's rights. *Cf.* Lanier, 73 F.3d at 1399 (Keith, J., dissenting) (criticizing "the insensitive tone and lack of compassion permeating the majority opinion").

100 *Cf.* Baker v. Carr, 369 U.S. 186 (1962) (upholding the justiciability of a claim that malapportioned legislative districts dilute voting rights and may violate the Equal Protection Clause).

101 Ensuring equal access to government services is a fundamental goal of conflict of interest laws. *See* Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57, 71-81 (1992) (outlining the goals of conflict of interest regulation).

102 In formulating these possible concerns I rely heavily on ethics-law analysis, as illustrated in the work of Professor Nolan. Two readers of an earlier draft—Professor Barry Friedman and Assistant United States Attorney Joseph Savage—offered helpful insights on this point.

bribery in certain cases where the governmental entity receives federal funds of more than $10,000.[103] Here there is a direct federal interest in the honest administration of federal funds.[104] In other instances, general criminal statutes such as those dealing with false income tax filings,[105] money laundering,[106] or securities violations[107] may expose corrupt acts by state and local officials. But Congress passed three statutes aimed, in part, at political corruption, and such legislation forces us to confront directly the question of why the national government cares about this type of crime.

One anticorruption statute is the Hobbs Act.[108] It provides that

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery *or extortion* or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> . . . .
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, *or under color of official right.*[109]

The Travel Act[110] provides, in part, that

> (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or

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103 18 U.S.C. § 666 (1994). *See* ABRAMS & BEALE, *supra* note 59, at 233 (discussing statute). "The bribe must have been given in connection with a business transaction, or series of transactions involving anything of value of $5,000 or more." *Id.* To the extent that constitutional questions cast doubt upon the utility of the mail and wire fraud statutes, § 666 may play a greater role in the anti-corruption context. Indeed this statute appears already to be emerging as a major component of federal anti-corruption efforts.

104 The Constitution grants Congress the power to disburse federal funds: "The Congress shall have Power to Lay and collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ." U.S. CONST. art. 1, § 8, cl. 1.

105 *See* Evans v. United States, 504 U.S. 255, 297 n.9 (1992) (Thomas, J., dissenting).

106 *See* United States v. Waymer, 55 F.3d 564, 567 (11th Cir. 1995) (indicting a member of the Atlanta Board of Education for mail fraud and money laundering in violation of 18 U.S.C. § 1956 (a)(1)(B)(i)), *cert. denied*, 116 S. Ct. 1350 (1996).

107 *See* United States v. ReBrook, 837 F. Supp. 162, 164 (S.D.W. Va. 1993) (indicting the state lottery attorney for wire fraud and insider trading in violation of securities laws), *aff'd in part and rev'd in part*, 58 F.3d 961 (4th Cir.), *cert. denied*, 116 S. Ct. 431 (1995).

108 18 U.S.C. § 1951 (1994).

109 *Id.* (emphasis added). *See also* ABRAMS & BEALE, *supra* note 59, at 198-224 (discussing the statute and its importance in corruption prosecutions).

110 18 U.S.C. § 1952 (1994).

> (2) commit any crime of violence to further any unlawful activity; or
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform—
> (A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned for not more than five years, or both; or
> (B) an act described in paragraph (2) shall be fined under this title; imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.
> (b) As used in this section . . . "unlawful activity" means . . . *extortion, bribery*, or arson in violation of the laws of the State in which they are committed or of the United States.[111]

Finally, the mail fraud statute proscribes, in part, "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[112] It is triggered whenever the mails are used "for the purpose of executing such scheme or artifice or attempting so to do."[113] In response to *McNally v. United States*,[114] Congress supplemented the basic statute with the following definition: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[115]

These three statutes have represented the core of the federal prosecutors' arsenal against state and local corruption.[116] In terms of

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111 18 U.S.C. § 1952 (1994) (emphasis added).

112 18 U.S.C. § 1341 (1994).

113 *Id.* In 1994, Congress broadened the statute to include "any private or commercial interstate carrier." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 250006, 108 Stat. 1796, 2087 (codified at 18 U.S.C. § 1341 (1994)).

114 483 U.S. 350 (1987).

115 Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508 (1988) (codified as amended at 18 U.S.C. § 1346 (1994)). This language applies as well to the wire fraud statute. 18 U.S.C. § 1343 (1994). The analysis in the Article applies equally to honest services prosecutions under both statutes.

116 *See, e.g.*, Moohr, *supra* note 2, at 154 n.6. Moohr discusses the roles of the mail fraud statute, the wire fraud statute, the Hobbs Act, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 (1994). In this Article, I have not given the wire fraud statute separate treatment because of its similarity to mail fraud. Under both statutes the question of "honest services" will be the same. As for RICO, it is a potentially powerful anticorruption weapon, perhaps too powerful. In most of the cases discussed in this Article, prosecutors did not use it. *But see* United States v. Mandel, 591 F.2d 1347, 1352 (4th Cir.) (containing one RICO count in mail fraud prosecution), *aff'd*, 602 F.2d 653 (4th Cir. 1979) (en banc). Use of RICO is, however, extensive. *See* ABRAMS & BEALE, *supra* note 59, at 475-76 (discussing RICO anticorruption cases). The three core statutes treated here (as well as wire fraud) are predicate offenses that can form the basis of a RICO prosecution. 18 U.S.C. § 1961(1) (1994).

constitutional power, it may be possible to justify the statutes on the ground that Congress can use its authority over commerce and the mails to curb activities of which it disapproves, even if it could not regulate them directly.[117] Before discussing issues of power in detail, I think it is helpful to return to the possible federal interests. The question remains why Congress cares about bribery, extortion, or general dishonest practices within another sphere of government. Why are those matters not simply the business of the other sovereign?

For those who reject the Court's perspective, there are two responses worth noting briefly. The first is that the other sovereign is not really a sovereign. States no longer occupy the coequal position with the national government that they once enjoyed. In reality, the United States is one nation; within that structure, the states are roughly equivalent to field offices or subdivisions.[118] Thus, it is entirely natural for the one true sovereign to police its internal operations. The highly intergovernmentalized nature of the American public sector demonstrates that dual federalism is long gone in fact as well as in theory.[119]

An alternative analysis invokes what might be viewed as a dormant national police power. The best illustration is Professor Little's concept of demonstrated state failure.[120] He presents it as a limiting principle and recognizes the importance of federalism principles in delineating the scope of national criminal law.[121] However, one could use the approach to endorse a form of variable national authority to deal with any domestic problem that reaches crisis proportions.[122] In a sense, that is why we have a national government: to do what the states cannot. Thus the national government has a potential interest in everything. At least in those instances when state authorities are not responding, state and local corruption arguably fits within the area of national interest.[123]

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117 *See infra* text accompanying notes 214-55.

118 For a useful discussion of this view of federalism, see Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993).

119 One way of looking at the intellectual currents favoring devolution to which I referred in the introduction is that they represent a form of counter-revolution in reaction to this development. Professor Sullivan describes the current climate as "a dramatic antifederalist revival." Sullivan, *supra* note 8, at 80.

120 Little, *supra* note 30, at 1032, 1077-80.

121 *Id.* at 1066-67. Professor Little recommends "some presumption against federalizing criminal conduct that is already prosecutable by the states."). *Id.* at 1067.

122 *Cf. id.* at 1032 n.12 (suggesting concept of varying areas of national and state concern). *But see* Beale, *supra* note 70, at 1297-98 (questioning criterion of criminal jurisdiction that supports federal intervention whenever states are viewed as not dealing adequately with an aspect of crime).

123 *See* Little, *supra* note 30, at 1079 & n.242 and accompanying text. As noted, Professor Little would require a particularized inquiry into the effectiveness of state and local action.

Positing federal interests of these two sorts as a predicate to constitutional analysis makes considerably less sense than it did prior to *Lopez*. After *Lopez*, the challenge is to identify national interests in combating state and local corruption that are consistent with respect for the role of states as somewhat separate and independent sovereigns. I have explored above the possibility of an equal access rationale.[124] At this point, it may be helpful to consider an alternative: national concern with confidence in governmental institutions. The comparisons to white-collar and organized crime are a good place to start: they are areas where federal law enforcement is well-established and widely accepted. These crimes subvert basic institutions and public confidence in them.[125] Preserving public confidence in government is an important national interest.

In a democratic society, government rests on the consent of the governed. If people come to view the government as not serving the public, they may well withdraw their consent, whether through passive actions, such as failure to vote, or more direct expressions of disapproval. Pervasive corruption can seriously undermine public confidence.[126] The Court recognized these considerations in *United States v. Mississippi Valley Generating Co.*,[127] a cornerstone of federal ethics laws. That case refused to give a narrow reading to a conflict of interest provision that forbade persons with direct or indirect interests in a private entity from representing the United States in transacting business with that entity. Particularly relevant is the statement that

> [t]he statute is directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shat-

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124 *See supra* text accompanying notes 100-02.

125 *See, e.g.*, Blakey, *supra* note 5, at 1198 (discussing effects of organized crime). In the case of organized crime, it should also be noted that individual states may not be able to deal with the problem. This is a standard rationale for federal involvement in the area.

126 *See, e.g.*, Michael W. Carey, Larry R. Ellis & Joseph F. Savage, Jr., *Federal Prosecution of State and Local Officials: The Obstacles to Punishing Breaches of the Public Trust and a Proposal for Reform* (pt. 1), 94 W. VA. L. REV. 301, 313-14 (1991); Kurland *supra* note 39, at 377 & n.26.

There is increasing concern among those who write about European affairs that lack of confidence in governmental elites, including perceptions of wide-spread corruption, can lead to social unrest. *See, e.g.*, William Pfaff, *France's New Pessimism Representing a Shift in Thinking*, BOSTON GLOBE, Dec. 30, 1996, at A11; Lynne Terry, *Clamor for Change Echoes Around Europe*, BOSTON GLOBE, Dec. 9, 1996, at A14; *see also* David Brooks, *The Right's Anti-American Temptation*, WEEKLY STANDARD, Nov. 11, 1996, at 23 (analyzing the disenchantment of some conservatives with American institutions, particularly the judiciary, and discussing the possibly of various forms of civil disobedience). One analyst has written that, at least in the nonwestern context, "widespread corruption should be viewed as an indicator that a regime is shaky and that U.S. reliance on such a regime for any purpose may be questionable, if not dangerous." STANLEY KOBER, CATO INST., WHY SPY? THE USES AND MISUSES OF INTELLIGENCE 6 (1996).

127 364 U.S. 520 (1961).

> tered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.[128]

Obviously, the federal government has a strong concern for corruption among its own employees. This concern would provide constitutional justification for statutes addressing that problem. There are at least three arguments for extending this concern to the state and local level. The first is that corruption anywhere within the country has a ripple effect on government at all levels. People may come to see "the system" as corrupt and withdraw their confidence from government as a whole. A second reason for concern is that state and local governments function as crucial points of entry for office seekers within the American democratic system.[129] The progression from city councilor to state legislator to member of Congress is a frequent one. Lack of confidence in the honesty and openness of state and local governments may discourage participation in them, depriving the national government of much of its talent pool. A third consideration is built upon the Framers' vision of two levels of government in perpetual competition with each other as a bulwark against tyranny.[130] Thus, as guardian of the constitutional order, the national government must act whenever corruption threatens to undermine its "competitors."[131]

It does not, however, follow that the federal government needs to act against the entire potential gamut of corruption and misconduct at the state and local level. Congress's apparent unwillingness to pass a general anticorruption statute aimed at these levels of government may stem from a recognition that federal interest in the matter has its

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128 *Id.* at 562.

129 *See* Merritt, *supra* note 43, at 1574; *see also* STONE ET AL., *supra* note 17, at 133-34 (citing Professor Jesse Choper's argument that federal officials' experience in state and local office ensures responsiveness to concerns of those levels of government).

130 According to James Madison:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises as to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

THE FEDERALIST No. 51, at 323 (James Madison) (C. Rossiter ed., 1961). *See* Merritt, *supra* note 43, at 1573-74. Given our constitutional evolution and the national government's built-in advantages, including the Supremacy Clause, there is no risk of the national government being swallowed up by the states. However, the converse could happen.

131 For a general discussion of the role of each government in controlling actions of the other, see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

In addition to the arguments for national interest offered above, it is possible to discuss the issue of corruption in economic terms that justify national efforts to deal with it. For example, extensive corruption may have an adverse effect on economic growth. According to Stanley Kober "corruption rewards firms on the basis of their political connections rather than the quality of their products and other strengths valued in a market economy." KOBER, *supra* note 126, at 7.

limits. Beyond the state-oriented arguments for limits made above, one should also note the relative absence of two of the principal arguments for federal action in domestic matters: the danger that competition among states will produce a "race to the bottom,"[132] and the lack of "externalities" that one state's failure to deal with the problem imposes on other states.[133]

C. The Mail Fraud Statute As a Special Case

Suppose one believes that the policy arguments advanced above justify a federal role, but would limit that role to forms of corruption that threaten the national interest in preserving democratic institutions and the public's confidence in them. How does the mail fraud statute measure up in this light, particularly when compared to the Travel Act and the Hobbs Act? Examination of the text of the three statutes suggests a fundamental difference between the Hobbs and Travel Acts, on the one hand, and the mail fraud statute, on the other. The first two are limited in their applicability by reference to specific crimes. In the political context, these crimes are extortion (Hobbs Act)[134] and extortion or bribery (Travel Act).[135] Thus any federal prosecution would have to prove the elements of these specific crimes.

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132 *See* Sullivan, *supra* note 8, at 104. The widely used concept of a "race to the bottom" posits that competition among states is undesirable in a variety of regulatory contexts. Market failures result from interstate competition to appease regulated entities rather than impose the level of regulation that a true national market would impose. Thus the national government must step in to impose uniformity. Professor Sullivan calls these actions "corrective," and refers to the areas of "health, safety, or environmental measures" as examples of matters requiring national action. *Id.* Although corruption within states may threaten national interests, it does not appear to result from competition *among* states to attract the most corrupt politicians.

133 *See generally* GEORGE F. BREAK, INTERGOVERNMENTAL FISCAL RELATIONS IN THE UNITED STATES (1967) (presenting major problems of intergovernmental finance in the United States). The concept of externalities also rests on notions of market failure caused, at least potentially, by interstate competition. In order to keep taxes low, a given state may choose to fund a social service, such as welfare, at a lower level than the national political process would choose. This can have external results on other states which become saddled with large, service-dependent populations. The national government might then step in with a grant program to equalize the situation. In the case of corruption, spillover effects on neighboring states would appear to be minimal, except, perhaps, by example. This negates another classic rationale for national intervention.

It is true that economic analysis suggests that corruption in any one state produces a market failure there because the political-governmental processes yield a different mix of public goods and services than they would if not skewed by corruption. However, the question remains whether such a situation justifies national intervention in that state. One might posit a national interest in an aggregate level of public goods and services unaffected by distorting influences such as corruption. This analysis, however, ignores the significance of states as separate entities.

134 18 U.S.C. § 1951 (1994).

135 18 U.S.C. § 1952(b) (1994).

The mail fraud statute contains no such limits. Its operative term is "fraud," a concept that the courts can, and do, define broadly. "Fraud" need not be limited by the relatively fixed boundaries of the criminal law, or even those of the common law at any particular point in time.[136] The federal courts have a relatively free hand in defining the concept. Congress increased this freedom substantially when it added the "honest services" language.[137] This language could take the inquiry beyond traditional criminal categories such as bribery and extortion into lesser offenses such as acceptance of gratuities,[138] and beyond the criminal law into the general area of government ethics. This textual difference is important. For example, it appears to have played a significant role in Judge Ralph Winter's influential dissent in *United States v. Margiotta.*[139] Judge Winter criticized the "limitless expansion of the mail fraud statute [which] subjects virtually every active participant in the political process to potential criminal investigation and prosecution."[140] He depicted mail fraud as a "catch-all political crime" to which federal prosecutors resort "when a particular corruption, such as *extortion,* cannot be shown or Congress has not specifically regulated certain conduct."[141]

Of course, bribery and extortion can be flexible concepts as well. Either might be stretched beyond its core conduct to reach gratuities offenses and influence peddling.[142] Indeed, Justice Thomas has criticized the Hobbs Act for having expansionist tendencies similar to those which Judge Winter found objectionable in the mail fraud statute.[143] Justice Thomas made these observations in *Evans v. United States,*[144] a case in which the majority both broadened and narrowed the scope of the Hobbs Act. On the one hand, the Court held that the requirement of "inducement" in extortion cases either does not

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136 *See* Durland v. United States, 161 U.S. 306, 313 (1896).

137 Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508 (codified as amended at 18 U.S.C. § 1346 (1994)).

138 *See, e.g.,* United States v. Sawyer, 878 F. Supp. 279 (D. Mass. 1995) (allowing prosecution of lobbyist, in part for mail fraud violations, on the theory that by giving gratuities to legislators he deprived citizens of their right to the legislators' honest services), *vacated,* 85 F.3d 713 (1st Cir. 1996).

139 688 F.2d 108, 139 (2d. Cir. 1982) (Winter, J., concurring in part and dissenting in part).

140 *Id.* at 143 (Winter, J., concurring in part and dissenting in part).

141 *Id.* at 144 (Winter, J., concurring in part and dissenting in part) (emphasis added). Judge Winter concurred in the defendant's conviction under the Hobbs Act for the same conduct. *Id.* at 139.

142 *See* ABRAMS & BEALE, *supra* note 59, at 198 ("The Hobbs Act now appears to be the statute of choice in prosecutions for the acceptance of official gratuities by state and local officials."). This comment was apparently made prior to the decision in *Evans v. United States,* 504 U.S. 255 (1992).

143 Evans v. United States, 504 U.S. 255, 290-91 (1992) (Thomas, J., dissenting).

144 504 U.S. 255 (1992).

apply to public officials,[145] or that if it does apply, the official need not initiate the transaction because "the coercive element is provided by the pubic office itself."[146] On the other hand, the Court emphasized the importance of a quid pro quo as an element of the offense of extortion.[147] It appears that the payment must be made in return for the agreement to perform "specific official acts,"[148] as opposed to a generalized purchase of goodwill.[149] This quid pro quo requirement may well represent a significant narrowing of the Hobbs Act.[150] Such a narrowing would be consistent with the text of the Act.

Judicial and legislative development of the mail fraud statute has, with one notable detour, moved consistently in an expansionist direction.[151] Initially, the statute served to prevent the use of the mails to carry instruments of fraud such as false advertisements of get-rich-quick schemes.[152] The Supreme Court early on, however, stressed the breadth of the concept of fraud.[153] The 1970s saw a major judicial expansion of the statute to political corruption through the doctrine of "honest services."[154] The theory was that fraud embraced a wide range of dishonest dealings, including breach of fiduciary duties.[155] Because public servants owe citizens duties of a fiduciary nature,[156] breaches of those duties could constitute fraud. One can sense the breadth of the honest services doctrine by sampling its various formulations in the Second Circuit's majority opinion in *Margiotta*: "intangible and abstract civil and political rights of the general citizenry;"[157] "fiduciary duty to the general citizenry not to deprive it of certain in-

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145 *Id.* at 265-66.

146 *Id.* at 266.

147 *Id.* at 268; *see also id.* at 272-73 (Kennedy, J., concurring in part and concurring in the judgment) (concluding that a quid pro quo is a required element).

148 *Id.* at 268.

149 *But see id.* at 274-75 (Kennedy, J., concurring in part and concurring in the judgment).

150 *See* Jane Fritsch, *A Bribe's Not a Bribe When It's a Donation*, N.Y. TIMES, Jan. 28, 1996, § 4, at 1 (discussing federal prosecutors' problems in satisfying quid pro quo standard). *See generally* Peter D. Hardy, *The Emerging Role of the Quid Pro Quo Requirement in Public Corruption Prosecutions Under the Hobbs Act*, 28 U. MICH. J.L. REFORM 409 (1995) (discussing in detail the doctrinal interplay between *Evans v. United States*, 504 U.S. 255 (1992), and *McCormick v. United States*, 500 U.S. 257 (1991), and lower courts' application of these decisions).

151 *See* Henning, *supra* note 33, at 441-69 (tracing the development of the statute through the 1994 amendment adding private interstate carriers).

152 *See id.* at 442.

153 *See* Durland v. United States, 161 U.S. 306, 314 (1896).

154 *See* Henning, *supra* note 33, at 460-62; Moohr, *supra* note 2, at 163-66; Podgor, *supra* note 33, at 227.

155 *See, e.g.*, United States v. Von Barta, 635 F.2d 999, 1006-07 (2d Cir. 1980) (discussing the fiduciary duties of a private sector employee).

156 *See* United States v. Margiotta, 688 F.2d 108, 123-26 (2d Cir. 1982) (applying the fiduciary duties of a public servant to a county political boss).

157 *Id.* at 121.

tangible political rights;"[158] and the "right [of county and town] to have their affairs administered honestly."[159] During the 1970s and 1980s, the doctrine furnished the basis for federal conviction of all sorts of state and local officials.[160]

In *McNally v. United States*,[161] decided in 1987, the Supreme Court overturned this substantial body of lower court precedent[162] and abolished the doctrine of honest services. The Court held that fraud under the statute had to involve some form of property, rather than "intangible rights, such as the right to have public officials perform their duties honestly."[163] The Court's analysis is surprisingly brief for such a significant decision. It relied in part on the language of the statute[164] and in part on two canons of statutory construction—the clear statement rule and the rule of lenity in criminal cases.[165] The Court also invoked general principles of federalism.[166] The potential importance of the latter for future analysis makes it worthwhile to quote the language in its entirety:

> Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.[167]

McNally must be read as a product of its time—a period when the Court was bitterly divided over the extent to which judicially enforceable principles of federalism could limit federal statutes affecting states. Two years earlier, *Garcia v. San Antonio Metropolitan Transit Authority*[168] held, narrowly, that there were few, if any, such limits. At the same time, the Court was developing the requirement that Congress state clearly its intent to curtail state and local prerogatives.[169] *McNally* represents an early, somewhat tentative, example of this development.[170]

If *McNally* was terse, the congressional response was even more terse. Without floor debate, as part of the Anti-Drug Abuse Act of

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158 *Id.*
159 *Id.* at 126.
160 *See, e.g.*, Henning, *supra* note 33, at 461 n.129.
161 483 U.S. 350 (1987).
162 *See id.* at 368 (Stevens, J., dissenting).
163 *Id.* at 358.
164 *See id.* at 358-59.
165 *See id.* at 359-60 (citing United States v. Bass, 404 U.S. 336, 347 (1971)).
166 *See id.* at 360.
167 *Id.*
168 469 U.S. 528 (1985).
169 *E.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).
170 For a discussion of the clear statement rule and its possible applicability to the statute in its current form see *infra* text accompanying notes 566-606.

1988, Congress added the following section to Title 18, to accompany the mail and wire fraud statutes: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to defraud another of the intangible right of honest services."[171] Congress did not respond by enacting an anticorruption statute that singles out particular forms of conduct,[172] nor did it refer specifically to state and local governments. Whether the Court will again narrow the statute on clear statement principles is the subject of Part V of this Article. Parts III and IV proceed on the assumption that this is not the case and examine possible constitutional issues.

Let us treat the amendment as ratifying everything that the lower courts had done in developing the honest services doctrine and inviting them to do more of the same. Viewed in this light, the mail fraud statute differs from the Hobbs and Travel Acts in a number of respects. It is not limited to specified crimes. It extends beyond traditional crimes such as bribery and extortion to potentially the entire realm of government ethics. Much of its content will not come from Congress at all. Instead, a vast number of choices on the part of federal prosecutors, judges, and juries will determine the scope of "honest services."[173] A statute of this breadth, intruding so deeply on the integral functions of state and local governments, ought to set off all sorts of federalism alarm bells. The first issue is the basic question of the national power to enact such a statute in the first place, especially in the post-*Lopez* environment.

III
MAIL FRAUD AND NATIONAL POWER—SOURCES AND LIMITS UNDER POST-*LOPEZ* ANALYSIS

A. A Settled Issue?

As recently as a decade ago, federalism-based objections to the mail fraud statute seemed constitutional folly and were "routinely reject[ed]."[174] In *McNally*, all members of the Court seemed to take as a

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171 Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508 (codified as amended at 18 U.S.C. § 1346 (1994)). For a recent judicial analysis of the legislative history of the amendment, see *United States v. Brumley*, 79 F.3d 1430, 1436-40 (5th Cir.) (rejecting the view that the amendment overturned *McNally* with respect to public officials), *reh'g en banc granted*, 91 F.3d 676 (5th Cir. 1996). *But see* Podgor, *supra* note 33, at 228 (arguing that amendment "effectively voided the *McNally* holding"); cases cited *infra* note 605.

172 There have been repeated proposals, so far unsuccessful, for a new federal statute to deal with state and local corruption. *See, e.g.*, ABRAMS & BEALE, *supra* note 59, at 248-53; Moohr, *supra* note 2, at 199-208.

173 *See, e.g.*, United States v. Margiotta, 688 F.2d 108, 144 (2d Cir. 1982) (Winter, J., concurring in part and dissenting in part); Moohr, *supra* note 2, at 191-93.

174 Moohr, *supra* note 2, at 178. *See, e.g.*, United States v. Silvano, 812 F.2d 754, 758-59 (1st Cir. 1987).

given congressional power to apply the statute to state and local governments in a broad, honest-services form.[175]. Congress's response shows that it shared that understanding. The dominant view that federalism had little role to play as a judicially enforceable limit on any congressional action was that expressed in *Garcia.* Indeed, as recently as 1992, Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia cited *Garcia* for the following proposition in a local corruption case prosecuted under the Hobbs Act: "Our precedents, to be sure, suggest that Congress enjoys broad constitutional power to legislate in areas traditionally regulated by the States—power that apparently extends even to the direct regulation of the qualifications, tenure, and conduct of state governmental officials."[176] If these three staunch federalists don't see a problem, why should anyone else?

B. *Lopez* and Its Significance

The answer is to be found in *Lopez*[177] and the renewed judicial willingness to take seriously the basic questions of national power that it symbolizes. Cases such as *Seminole Tribe of Florida v. Florida,*[178] *New York v. United States,*[179] and *Gregory v. Ashcroft,*[180] as well as Justice Thomas's dissenting opinion in *U.S. Term Limits, Inc. v. Thornton*[181] are examples of this approach.[182] *Lopez* itself struck down the Federal Gun-Free School Zones Act on the ground that it exceeded Congress's authority under the Commerce Clause.[183] That case has already been the subject of extensive analysis,[184] but I wish to review briefly several specific aspects of the decision and posit their signifi-

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175 483 U.S. 350 (1987). Justices Stevens and O'Connor dissented on the ground that the lower courts could develop the doctrine as a matter of statutory construction. Under this view, Congress clearly had the power to enact the statute. The majority also appeared to accept congressional power when they stated:

> It may well be that Congress could criminalize using the mails to further a state officer's efforts to profit from governmental decisions he is empowered to make or over which he has some supervisory authority, even if there is no state law proscribing his profiteering or even if state law expressly authorized it.

Id. at 361 n.9. *See also* Kurland, *supra* note 39, at 402.

176 Evans v. United States, 504 U.S. 255, 291 (1992) (Thomas, J., dissenting) (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 547-54 (1985)).

177 United States v. Lopez, 115 S. Ct. 1624 (1995).

178 116 S. Ct. 1114 (1996).

179 505 U.S. 144 (1992).

180 501 U.S. 452 (1991).

181 115 S. Ct. 1842, 1875 (1995) (Thomas, J., dissenting).

182 For a detailed discussion of these cases see *infra* Part IV.

183 U.S. CONST. art. 1, § 8, cl. 3, granting Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

184 *E.g.*, Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13, 34-45 (1995). Professor, now Associate Justice Fried of the Supreme Judicial Court of Massachusetts, views *Lopez* as "at once a modest and a conscientious exercise of the Court's power." *Id.* at 37.

cance for the mail fraud statute. A fundamental aspect is the reaffirmation of dual federalism, what Chief Justice Rehnquist referred to as "first principles."[185] "The Constitution," he wrote, "creates a Federal Government of enumerated powers."[186] All others remain with the states. This constitutional scheme is far removed from any notion of a national police power.[187] A second aspect is that judicial review is available to keep Congress within its constitutional bounds. This concept, under a cloud since *Garcia*, emerges most clearly in Justice Kennedy's concurring opinion in which Justice O'Connor joined.[188] A third important aspect of *Lopez* is that the Court applied these principles to an exercise of congressional authority under the Commerce Clause and found it invalid.[189] Previously, the commerce power had seemed particularly resistant to judicial review,[190] leaving Congress a virtual free hand in any area where it might find any connection to commerce.[191]

Finally, it is significant that *Lopez* involved a federal criminal statute. Commentators have noted the connection between the breadth of the commerce power and the sweep of the federal criminal law.[192] For the *Lopez* Court, however, the criminal law dimension of the problem raised a red flag: incursion on traditional state power.[193] Chief Justice Rehnquist brought dual federalism to bear by emphasizing the states' "'primary authority for defining and enforcing the criminal law.'"[194] *Lopez* creates a new constitutional dynamic under which the Court will not take for granted the existence of national power. The extent to which the federal law "seeks to intrude upon an area of traditional state concern"[195] seems to be a factor cutting against that law's validity. Criminal laws dealing with state and local corruption may be particularly vulnerable. As one prescient analyst wrote prior to *Lopez*, "[A]ny fundamental reevaluation of the scope of the commerce clause could have a devastating effect on the federal government's role in prosecuting state and local official corruption."[196]

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185 *Lopez*, 115 S. Ct. at 1626.
186 *Id.*
187 *See id.* at 1631 n.3.
188 *See id.* at 1637-40 (Kennedy, J., concurring).
189 *Id.* at 1626.
190 *See id.* at 1639-40 (Kennedy, J., concurring).
191 *See id.* at 1658-59 (Breyer, J., dissenting).
192 *See* Beale, *supra* note 30, at 982.
193 *Lopez*, 115 S. Ct. at 1631 n.3.
194 *Id.* (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993)).
195 *Id.* at 1640 (1995) (Kennedy, J., concurring).
196 Kurland, *supra* note 39, at 373.

C. *Lopez* and the Federal Criminal Law—Initial Stirrings

Lopez was handed down in April of 1995. Criminal defendants were quick to see its potential. Since the decision, a number of federal criminal laws have faced challenges as to Congress's authority to enact them. Results vary, but increasingly the trend, particularly in the courts of appeals, has been to reject the challenges.[197] For example, courts have upheld the carjacking statute,[198] but not without dissent.[199] Regulation of firearms that have moved in interstate commerce has been upheld,[200] as well as regulation of machine guns.[201] On the other hand, a court of appeals has held that a federal arson statute cannot constitutionally reach a building whose main connection with interstate commerce is the receipt of natural gas.[202] Courts have split on the validity of the Child Support Recovery Act,[203] and the Federal Access to Clinics Act, with parties challenging these statutes tending to achieve greater success at the district court level.[204]

The preceding is not complete, and it is subject to updating on a virtual daily basis. Professor Merritt takes the position that the early decisions "confirm that the courts will identify [*Lopez*'s] distinguishing features . . . and treat [it] as a narrow, exceptional ruling."[205] In her view, the major impact of *Lopez* may come in the form of narrow con-

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197 *See, e.g.*, United States v. Beuckelaere, 91 F.3d 781, 783 (6th Cir. 1996) ("[*Lopez*] has raised many false hopes.").

198 *See* United States v. Coleman, 78 F.3d 154, 158-60 (5th Cir.), *cert. denied*, 117 S. Ct. 230 (1996); United States v. Hutchinson, 75 F.3d 626, 627 (11th Cir.), *cert. denied*, 117 S. Ct. 241 (1996); United States v. Oliver, 60 F.3d 547, 549-50 (9th Cir. 1995); United States v. Bishop, 66 F.3d 569, 575-76 (3d Cir.), *cert. denied* 116 S. Ct. 681 (1995).

199 *See Bishop*, 66 F.3d at 590 (Becker, J., concurring in part and dissenting in part).

200 *See* United States v. McAllister, 77 F.3d 387, 389-90 (11th Cir.), *cert. denied*, 117 S. Ct. 262 (1996); United States v. Sorrentino, 72 F.3d 294, 296 (2d Cir. 1995); United States v. Hanna, 55 F.3d 1456, 1462 (9th Cir. 1995).

201 *E.g.*, United States v. Kenney, 91 F.3d 884, 885-86 (7th Cir. 1996).

202 *See* United States v. Pappadopoulos, 64 F.3d 522, 527-28 (9th Cir. 1995). The case should not be read as striking down the statute but, at most, as holding that it could not constitutionally extend to the facts before the court. The arson statute contains a jurisdictional requirement that the property in question bear a relationship to interstate commerce. Cases like *Pappadopoulos* may simply represent a failure by the prosecution to establish this element. *See* Daniel Weintraub, Resisting the Urge to Extend *United States v. Lopez*: An Analysis of *Lopez* Challenges to Federal Criminal statutes in the Lower Courts 17-20 (1996) (unpublished seminar paper, Boston College Law School) (on file with author).

203 *Compare* United States v. Mussari, 894 F. Supp. 1360, 1362-63 (D. Ariz. 1995) (holding Act invalid because it exceeded Congress's authority to legislate pursuant to the Commerce Clause and violated the Tenth Amendment), *rev'd*, 95 F.3d 787, 790-91 (9th Cir. 1996), *with* United States v. Hampshire, 892 F. Supp. 1327, 1329-30 (D. Kan. 1995) (holding Act valid because failure to pay child support has an effect on interstate commerce), *aff'd*, 95 F.3d 999, 1002-04 (10th Cir. 1996).

204 *E.g.*, United States v. Wilson, 880 F. Supp. 621 (E.D. Wis.), *rev'd*, 73 F.3d 675, 680-88 (7th Cir. 1995), *cert. denied*, 117 S. Ct. 46 (1996); Huffman v. Hunt, 923 F. Supp. 791, 812-14 (W.D.N.C. 1996).

205 Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 712 (1995).

struction of federal criminal statutes.[206] However, one should not be too quick to dismiss the direct effect of *Lopez* on questions of internal limits on the reach of the Commerce Clause. Lower courts will engage in a context-sensitive inquiry. To the extent that an underlying activity looks like a traditional state matter (e.g., domestic relations) or relatively noncommercial (e.g., the presence of a residential building), the court may lean toward a finding of invalidity. What has helped push the carjacking cases in the other direction is the clear relationship of vehicles to interstate travel and, perhaps, to the economy in general.

A particularly difficult problem for the lower courts is how to deal with statutes that contain a "jurisdictional element,"[207] requiring the particular case have a relationship to commerce. Justice Breyer predicted this problem in his *Lopez* dissent.[208] The courts are uncertain whether they can look at the class of activities of which the case before them is an example[209] or whether they need to conduct a case-by-case inquiry into the effect on commerce.[210] Professor, now Supreme Judicial Court of Massachusetts Associate Justice, Charles Fried has stated that courts will take a stricter approach to jurisdictional element cases.[211] However specific issues take shape, one can already see an important general point. Cases questioning national authority to enact criminal laws would have been laughed out of court a decade ago. After *Lopez*, they are taken seriously and sometimes succeed.

D. Mail Fraud and Post-*Lopez* Analysis

The question that arises is how to apply post-*Lopez* analysis, in its narrow sense of the initial existence of federal power, to the mail fraud statute. *Lopez* is not directly on point because Congress passed the law pursuant to the Postal Clause.[212] However, assertions of au-

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206 *Id.* at 713.

207 *Lopez*, 115 S. Ct. at 1631 (noting that the Gun-Free School Zones Act "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce").

208 *Id.* at 1664-65 (Breyer, J., dissenting) (noting existence of more than one hundred statutes, including criminal statutes, that use the term "affecting commerce").

209 *See* United States v. Bishop, 66 F.3d 569, 584 (3d Cir.) *cert. denied*, 116 S. Ct. 681 (1995).

210 *See* United States v. Pappadopoulos, 64 F.3d 522, 527 (9th Cir. 1995).

211 Fried, *supra* note 184, at 40. However, it is far from clear that lower courts have gotten the message. In *United States v. Stillo*, 57 F.3d 553, 558 (7th Cir.) *cert. denied*, 116 S. Ct. 383 (1995), the court upheld Hobbs Act jurisdiction under the "depletion of assets" theory. The view of such cases is that extortion affects commerce because the victim would have to utilize funds that might otherwise be used for commercial purposes. *See generally* ABRAMS & BEALE, *supra* note 59, at 220-21 (discussing this theory). *But see* United States v. Collins 40 F.3d 95, 100-01 (5th Cir. 1994) (rejecting "work disruption" rationale); Merritt, *supra* note 205, at 715-17 (discussing narrow construction of Hobbs Act after *Lopez*).

212 U.S. CONST. art. I, § 8, cl. 7.

thority under any grant of power should now be open to question in order to preserve the principle of a limited national government which Chief Justice Rehnquist identified as fundamental. If it is a stretch to go from "commerce" to regulating guns near schools, it may also be a stretch to go from "establish[ing] Post Offices and Post Roads"[213] to criminalizing misconduct by state and local officials.

The classic rationale for the mail fraud statute is that Congress is acting to protect "the integrity of the United States mails."[214] The original statute, enacted in 1872, "appears designed to protect the post office from being abused as part of a fraudulent scheme."[215] A good example would be schemes by "city slickers" to fleece gullible country folk by mailing false investment materials.[216] Once recognized, however, this power can take Congress a long way towards regulating indirectly activities which it could not otherwise regulate directly. The best example of this is lotteries.[217] In *Ex parte Jackson*, the Court upheld Congress's power to exclude lottery materials from the mail.[218] The Court reasoned that "[t]he right to designate what shall be carried necessarily involves the right to determine what shall be excluded."[219] Thus Congress could "refuse its facilities for the distribution of matter deemed injurious to the public morals."[220] As the latter quote suggests, the postal power contains the seeds of a mini-national police power over a broad range of activities normally subject to state regulation.[221] The Court was fully aware of this potential when, thirty-nine years after *Jackson* it stated that:

> [t]he overt act of putting a letter into the post office of the United States is a matter that Congress may regulate. . . . Whatever the limits to its power, it may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy, *whether it can forbid the scheme or not.*[222]

The fact that the United States owns the mails makes this broad authority easier to accept, although it might not carry over to regula-

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213 *Id.*

214 *E.g.*, McNally v. United States, 483 U.S. 350, 365 (1987) (Stevens, J., dissenting).

215 Henning, *supra* note 33, at 442.

216 *See id.*

217 *See generally* Blakey, *supra* note 5, at 1222-38 (discussing lotteries and the Constitution). This Excursus, part of the Appendix to Professor Blakey's contribution to the Hastings Symposium, is reprinted from G. Robert Blakey & Harold A. Kurland, *The Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923, 927-43 (1978).

218 96 U.S. 727 (1877).

219 *Id.* at 732.

220 *Id.* at 736.

221 Congress considered the constitutional issues extensively. Blakey, *supra* note 5, at 1228 n.40, 1234 n.58. Although debate focused on Congress's power to regulate lotteries chartered by the states, broader issues of federalism were in evidence.

222 Badders v. United States, 240 U.S. 391, 393 (1916) (emphasis added) (citation omitted).

tion of private mail carriers or to regulation of wire transmissions.[223] In light of *Lopez*, should there not be limits on boot-strapping uses of the postal power?[224] Arguing in *McNally* for the "honest services" reading of the mail fraud statute, Justice Stevens trotted out the old chestnuts about "protect[ing] the integrity of the United States mails"[225] and the statute's focus "upon the misuse of the Postal Service, not the regulation of state affairs."[226] The integrity that is really at issue, however, is that of state and local governments. A small tail—a relatively insignificant mailing that is somehow related to a broader range of actions[227]—can wag a very large dog.[228] Post-*Lopez* analysis might suggest imposing limits on this use of the statute. Courts might develop an approach that makes a concept like "effect on the mails" a constitutional requirement[229] rather than a matter of statutory construction.[230] Alternatively, the inquiry might focus on whether mail fraud honest services prosecutions threaten dual federalism by intruding too deeply upon a "traditional" state sphere.

There is, however, language in *Lopez* that appears to validate the "right to exclude" analysis underlying the broad use of the postal power. Chief Justice Rehnquist identified "three broad categories of activity that Congress may regulate under its commerce power."[231] The Gun-Free School Zones Act required analysis under the third category: "activities having a substantial relation to interstate commerce"

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223 *See* Henning, *supra* note 33, at 468-76 (discussing private carrier amendment as exercise of commerce power). The wire fraud statute also appears to rest on the commerce power. It refers to transmission "by means of wire, radio, or television communication in interstate or foreign commerce." 18 U.S.C. § 1343 (1994).

224 I will limit the inquiry here primarily to honest services issues under the mail fraud statute, 18 U.S.C. § 1341, although the federal common law analysis I advocate in Part V would result in the same reading of honest services regardless of the type of carrier.

225 McNally v. United States, 483 U.S. 350, 365 (1987) (Stevens, J., dissenting).

226 *Id.* at 366 (Stevens, J., dissenting) (quoting United States v. States, 488 F.2d 761, 767 (8th Cir. 1973)).

227 *See* Schmuck v. United States, 489 U.S. 705, 710-15 (1989). This case perpetuates the view that the mailing need only have a tangential relation to the scheme. The Court might, of course, tighten this requirement. *See id.* at 723-24 (Scalia, J., dissenting). The result would be a reduction in mail fraud prosecutions generally, not just in those relating to state and local corruption.

228 *See* Kurland, *supra* note 39, at 415 (stating that corruption cases reflect paramount national interest in assuring honesty rather than concern for sanctity of commerce or mails).

229 There is a possible analogy to actions "affecting commerce," at least if that concept were applied vigorously. Thus an attempt to rob the mails would have an effect on them, while sending matters relating to a scheme to defraud would not. As discussed below, such a development is unlikely. *See infra* text accompanying notes 237-56.

230 *See* Henning, *supra* note 33, at 450-60 (discussing the role that broad construction has played in the development of the statute). *See also id.* at 442 (detailing origins of the mail fraud statute).

231 United States v. Lopez, 115 S. Ct. 1624, 1629 (1995).

or "that substantially affect interstate commerce."[232] However, the category that is relevant to the analysis here is the first: Congress's power to regulate "the use of the *channels* of interstate commerce."[233] Chief Justice Rehnquist cited, with apparent approval, the following language from *Caminetti v. United States*:[234] "the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question."[235]

Coming from Chief Justice Rehnquist, in the heart of his *Lopez* analysis, this is a surprising use of authority. *Caminetti* involved the Mann Act, which prohibits the transportation of women across state lines for immoral purposes.[236] The conclusion that Congress could use the Commerce Clause in such a national police power fashion had come only after hard-fought battles on the terrain of federalism. The key judicial decision was the *Lottery Case*.[237] In a five-to-four decision, rendered after two rearguments,[238] the Court upheld a statute prohibiting the interstate transportation of foreign lottery tickets. The majority conceded that Congress was regulating morality,[239] but rejected arguments based on the Tenth Amendment.[240] It was clear to the majority that Congress was "invested with the power to regulate commerce among the several States [and so may] provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another."[241] The dissenters denounced the commerce rationale as a "pretext"[242] for an exercise of a national police power[243] and invoked the constitutional vision of a limited national government.[244]

The *Lottery Case* dissenters seem closer to the Chief Justice's views of federalism as he explained them in *Lopez*. In the Commerce Clause context, however, the current Court appears willing to unleash the *Lopez* weapon only if the regulated activity is purely intrastate in character.[245] Such forms of regulation may pose a particular danger of

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232 *Id.* at 1629-30.

233 *Id.* at 1629 (emphasis added). *See* Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of* United States v. Lopez, 46 CASE W. RES. L. REV. 757, 787-88 (1996) (discussing reach of the channels of commerce rationale).

234 242 U.S. 470 (1917).

235 *Id.* at 491.

236 18 U.S.C. § 2421 (1994).

237 Champion v. Ames, 188 U.S. 321 (1903).

238 *See id.* at 325.

239 *See id.* at 357.

240 *See id.*

241 *Id.* at 356 (punctuation altered).

242 *Id.* at 372 (Fuller, C.J., dissenting) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819)).

243 *See id.* at 365 (Fuller, C.J., dissenting).

244 *See id.* at 366 (Fuller, C.J., dissenting).

245 *See* Fried, *supra* note 184, at 40.

national incursion upon state authority. In *Lopez*, the Court was able to apply traditional analysis, but with a more rigorous definition of commerce.[246] The same analysis could carry over to statutes regulating intrastate activities that "affect" commerce.

It is not surprising, however, that the Court appears to have left intact the broad framework of congressional authority under the first two categories of regulation of commerce: regulating "the use of the channels of interstate commerce;"[247] and regulating and protecting "the instrumentalities of interstate commerce, or persons or things in interstate commerce."[248] To rethink them—to revisit the *Lottery Case*, for example—would require a major alteration of existing doctrine that *Lopez* did not effectuate. Any such revision would present major difficulties. Examining whether a purported commercial regulation is actually a "pretext" for control of morality would force the Court to probe deeply into legislative motives.[249] Balancing the strength of national and state interests prior to finding the existence of national power would be a serious departure from existing practice, although balancing may be appropriate when the Court considers the more limited question of external limits on regulation of states.[250] As for internal limits, the Court appears to have meant what it said in *Lopez*.

The same rationale ought to apply to the Postal Power. One can view the mail fraud statute, in its honest services form, as valid under a "channels of mail" analysis. Congress may well be regulating a subject over which it has no power. Once an aspect of that subject reaches the mails, however, Congress can regulate that aspect, even if the regulation takes it deeply into some otherwise off-limits domain of the states. Post-*Lopez* analysis does not provide internal limits here. Tails

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246 Under this view of *Lopez*, the disagreement among all members of the Court, except for Justice Thomas, was a relatively narrow one concerning whether a particular activity could be classified as "commerce," rather than a fundamental debate over Commerce Clause methodology.

247 United States v. Lopez, 115 S. Ct. 1624, 1629 (1995).

248 *Id.*

249 *See* Fried, *supra* note 184, at 40:

> Given the plenary nature of the very idea of regulation, the search for motive . . . is properly discarded, not as too intrusive or difficult, but as irrelevant. The commerce power thus extends to forbidding the shipment of certain goods for whatever reason—because they will damage the channels themselves, or just because the use of those channels ought to be closed to them.

(footnote omitted); STONE ET AL., *supra* note 17, at 162-63 (discussing problems with the pretext approach).

250 *See infra* text accompanying notes 414-20 (discussing balancing interpretation of *National League of Cities v. Usery*, 426 U.S. 833 (1976)).

can wag dogs under both the commerce and postal powers; *Jackson*[251] and *Badders*[252] are still good law.[253]

Still, one should not forget about *Lopez* completely when it comes to the question of initial congressional power to enact an anticorruption law like the mail fraud statute. Even a few years ago most people would have thought *that* decision improbable at best. I take a broad view of post-*Lopez* analysis in its general sense, but subscribe to the narrow view of the decision's precedential weight for similar questions.[254] One should always be prepared, however. Chief Justice Rehnquist may have been laying the groundwork for a broader reexamination of national power. The Court has until now accepted far more extensive applications of the Postal Clause to protect the mails than the hypothetical extensions that Chief Justice Marshall found "necessary and proper" in *McCulloch v. Maryland*.[255] It may, therefore, be advisable to consider the possibility of an alternative source of national power to enact a broad anticorruption statute.

E. An Alternative Source—Guarantee Clause Analysis

In a major treatment of the federal role,[256] Professor Adam Kurland identifies the national interest in public confidence in government as part of the rationale for viewing the Guarantee Clause[257] as a source of national power to deal with state and local corruption.[258] There are a number of distinct advantages to the Guarantee Clause approach. It avoids the happenstance aspect of federal prosecutions that rely on the presence of "commerce" or use of the mails, when neither is the real issue.[259] The Clause is part of an Article of the Constitution that limits states in several ways.[260] Its phraseology—

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251 *Ex parte* Jackson, 96 U.S. 727 (1877).

252 Badders v. United States, 240 U.S. 391 (1916).

253 It is perhaps possible to allow Congress more latitude under the Commerce Clause because this power is more central to the ability of the national government to function.

254 *See* Fried, *supra* note 184, at 37 (characterizing *Lopez* as "modest and a conscientious exercise of the Court's power"). *See also id.* at 41 ("Justice Souter's complaint that the Court was setting out on a doctrinal course that would lead straight to *Lochner* has a distinctly 'Chicken Little' quality about it.").

255 In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 417-19 (1819), Chief Justice Marshall developed the scope of the Necessary and Proper Clause. He used as an example the postal power and argued that it would be necessary and proper for Congress to penalize theft of mail even though this might not be regarded as indispensable. As noted, it is a large step from such protections of the exercise of a power to using that power to enact legislation concerning morality.

256 Kurland, *supra* note 39.

257 U.S. CONST. art. IV, § 4.

258 *See* Kurland, *supra* note 39, at 376-77 (discussing the national interest in public confidence in government).

259 *See id.* at 415-16.

260 Article IV also contains the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, and the original Privileges and Immunities Clause, U.S. CONST. art. IV, § 2, cl. 1.

"The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."[261]—strongly implies congressional power to implement the guarantee.[262] The Framers were concerned with honesty and virtue in government.[263] Finally, Congress may answer federalism-based objections to exercises of national authority over states when it acts under a specific power that implies altering the federal-state balance.[264]

Despite these strong points, I find the Guarantee Clause a problematic source of national power to deal with state and local corruption.[265] The Clause seems designed for in extremis situations where the basic form of state government has been altered. Extending it to the control of everyday operations of state and local governments is a considerable textual leap. Moreover, it represents a multiple finesse of the concept of limited national powers that is central to post-*Lopez* analysis. Indeed, part of that analysis, in its broad sense, reflects the Court's recognition of the Guarantee Clause as a possible source of *limits* on national power over states. Justice O'Connor cited the Clause in *Gregory v. Ashcroft*[266] as authority for the importance of states' determinations of the qualifications of their officials.[267] She returned to the issue in *New York v. United States*,[268] noting the Clause's potential role in preserving state institutions and accountability from the imposition of federal standards.[269] Academics have differing views on the proper role of the Guarantee Clause,[270] but the influential writings of Professor Deborah Merritt analyze it as a state shield rather than a federal sword.[271]

Whether or not the Guarantee Clause thesis is persuasive, it helps us to focus on whether the commerce and postal powers are sufficient to authorize the current federal role in prosecuting state and local corruption. With respect to the use of the postal powers in the mail fraud statute, I believe that the initial answer to such questions is affirmative. Under the narrow version of post-*Lopez* analysis, one can

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261 U.S. CONST. art. IV, § 4.

262 *See* Kurland, *supra* note 39, at 375.

263 *See id.* at 424-35.

264 *See id.* at 475; *see also* Fitzpatrick v. Bitzer, 427 U.S. 445, 454-55 (1976) (discussing exercises of power under Fourteenth Amendment).

265 *See* Moohr, *supra* note 2, 184-85 (discussing, but indirectly rejecting, Guarantee Clause thesis).

266 501 U.S. 452, 462 (1991).

267 *Id.* at 462-63 (citing Luther v. Borden, 48 U.S. (7 How.) 1 (1849)).

268 505 U.S. 144 (1992).

269 *Id.* at 185-86.

270 *See generally Ira C. Rothgerber, Jr., Conference on Constitutional Law: Guaranteeing a Republican Form of Government*, 65 U. COLO. L. REV. 709 (1994) (presenting the range of academic views on the Guarantee Clause).

271 *E.g.*, Merritt, *supra* note 43, at 1583-84 (discussing the importance of the Guarantee Clause as a basis for the "autonomy model of federalism").

fairly find authorization for what Congress has done. Determining the internal limits, however, does not end the inquiry under post-*Lopez* analysis, which, in its broader form, requires consideration of external constraints on enumerated powers. *New York v. United States* stands for the proposition that federalism-based limits, seemingly nonexistent after *Garcia*, now play a role in constitutional analysis.[272] In the context of the mail fraud statute, they pose a serious problem.

IV
EXTERNAL LIMITS ON NATIONAL POWER AND POST-*LOPEZ* ANALYSIS—FROM *NATIONAL LEAGUE OF CITIES* TO *NATIONAL LEAGUE OF CITIES*

A. Twenty Years Of Doctrinal Uncertainty

In 1976, the 5-to-4 decision in *National League of Cities v. Usery*[273] sent shock waves throughout the constitutional law community.[274] In what Justice Brennan decried as a wholesale abandonment of existing doctrine,[275] the Court held that there are federalism-based limits on congressional power to regulate states even when the regulation would otherwise be a permissible exercise of national authority.[276] *Garcia*[277] overruled *National League of Cities* nine years later, but strong dissents kept alive the possibility of external, federalism-based limits on enumerated powers.[278]

Any theory of judicially enforceable external limits has to address a number of criticisms, two of which are central: why is any such theory needed given the limited powers of the national government, and what are the possible constitutional sources of the theoretical limits? As to the first, Justice O'Connor has stated that the Court's willingness to construe broadly the "limited" powers, especially the commerce power, has created a constitutional imbalance that reverses the Framers' design.[279] No one can deny the fact of expansion. However, if it is an error, narrow construction of enumerated powers, such as oc-

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272 *See* Candice Hoke, *Constitutional Impediments to National Health Reform: Tenth Amendment and Spending Clause Hurdles*, 21 HASTINGS CONST. L.Q. 489, 526-50 (1994) (discussing importance of *New York v. United States*).

273 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

274 *See* Hoke, *supra* note 272, at 527.

275 *See National League of Cities*, 426 U.S. at 875 (Brennan, J. dissenting).

276 *See id.* at 842.

277 Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

278 *See id.* at 580-89 (O'Connor, J., dissenting); *see also id.* at 579-80 (Rehnquist, J., dissenting).

279 *Id.* at 582-83 (O'Connor, J., dissenting).

curred in *Lopez*, might be the most direct way to correct it.[280] Narrow construction of particular powers may not really afford the states much protection, as internal limits have proven to be difficult to enforce. As for external limits, the question of constitutional source is a difficult one. *National League of Cities* suggested that the Tenth Amendment may provide external limits,[281] and that constitutional provision continues to play an important role despite its somewhat tautological nature.[282] In recent years, the Guarantee Clause[283] has emerged as a potential source, thanks in part to the writings of Professor Merritt,[284] but this clause can also be seen as an instrument of nationalism.[285] Even the federalistic wing of the Court has seemed reluctant to attach great weight to it.[286] Perhaps the answer is to be found in "principles of federalism"[287] or in the structure of the Constitution itself.

It was obvious, even in *Garcia*, that the concept of external limits would not die an easy death before the Supreme Court.[288] Recent decisions have shown that it is very much alive. That is why I refer to post-*Lopez* analysis, in the broad sense, as embracing the concept, even though *Lopez* does not, on its face, present the question.[289] The possibility of external limits on congressional power over states is directly relevant to the question of federal power to prosecute state and local officials for governmental misconduct.

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280 *Lopez*, of course, may not represent a substantial step toward narrow construction. The importance of the decision may be symbolic, rather than a radical step toward a new methodology.

281 National League of Cities v. Usery, 426 U.S. 833, 842-43 (1976) (citing Fry v. United States, 421 U.S. 542, 547 n.7 (1975)), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

282 *See* New York v. United States, 505 U.S. 144, 156-57 (1992).

283 U.S. CONST. art. IV, § 4.

284 *See, e.g.*, Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988).

285 *See* Kurland, *supra* note 39, at 425.

286 *See New York*, 505 U.S. at 184 (1992). *See also* Gregory v. Ashcroft, 501 U.S. 452, 463 (1991).

287 *See* Younger v. Harris, 401 U.S. 37, 49-54 (1971).

288 Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 580 (1985) (Rehnquist, J. dissenting); *see also id.* at 589 (O'Connor, J., dissenting).

289 The fact that Chief Justice Rehnquist did not even cite the Tenth Amendment is indicative of the extent to which the decision is, on the surface at least, a narrow one. However, once one recognizes its symbolic nature—and the early reference to "first principles," United States v. Lopez, 115 S. Ct. 1624, 1626 (1995), is clear evidence of this symbolism—a broad use of the term "post-*Lopez*" seems appropriate. *See* Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1919 (1995) (referring to the "post-*Lopez* era"). There are possible overtones of external limits analysis in Justice Kennedy's references to an area of "traditional state concern." *Lopez*, 115 S. Ct. at 1641 (Kennedy, J., concurring). The concept of traditional state functions was central to *National League of Cities*' identification of limits to the exercise of enumerated powers.

B. The Recent External Limits Cases

1. *New York v. United States—An Uncertain Trumpet*

The obvious candidate for invocation at this point is *New York v. United States.*[290] Of the four Supreme Court cases I will discuss, *New York* is one of two that struck down a congressional statute on constitutional grounds.[291] However, the holding has potentially broader applicability than the holding in *Seminole Tribe of Florida v. Florida,*[292] which is based on the Eleventh Amendment. At issue in *New York* was a section of the Low-Level Radioactive Waste Policy Amendments Act of 1985[293] which the Court interpreted as requiring states, under certain conditions, either to "take title" to radioactive waste within their borders or to regulate nuclear waste as Congress directed.[294] The majority viewed the statute as incompatible with Congress's inability to "commandeer[ ] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[295] Justice O'Connor, for the majority, drew on the nature of our "concurrent" federal system,[296] under which each government acts directly on the people in its areas of power.[297] The states are not "mere political subdivisions of the United States."[298]

The key to Justice O'Connor's opinion is her emphasis on accountability.[299] She viewed as essential the ability of citizens of each state to determine which level of government is responsible for a particular regulatory decision. This permits the democratic process to function effectively at both the state and federal levels. Congressional commandeering would blur these lines because citizens might not know which level was responsible.[300] This dimension of the opinion is a clear step toward some state sovereignty and a possible restriction of *Garcia.*[301] However, Justice O'Connor's analysis weakened this thrust considerably by suggesting that the question of sovereignty-based lim-

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290 505 U.S. 144 (1992).

291 *Id.* at 188. The other case is *Seminole Tribe of Florida v. Florida,* 116 S. Ct. 1114 (1996). For a discussion of this case see *infra* text accompanying notes 335-49.

292 116 S. Ct. 1114 (1996).

293 *New York,* 505 U.S. at 149.

294 *Id.* at 174-75.

295 *Id.* at 161 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)). Justice O'Connor later stated that "[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." *Id.* at 178.

296 *Id.* at 163 (quoting Gregory v. Ashcroft, 501 U.S. 452, 461 (1991)).

297 *See id.* at 163-66.

298 *Id.* at 188.

299 *See id.* at 168-69, 182-83.

300 *See id.* at 168-69.

301 *See* Hoke, *supra* note 272, at 539 (analyzing *New York* as possibly undermining *Garcia*).

its on federal power is just another way of considering whether the federal government has power over the subject matter in the first place.[302] This lack of distinction between external and internal limits on federal power is an obvious weakness of *New York*[303] and may well diminish its precedential force as a potential restoration of *National League of Cities*.[304] Indeed, one critic has already predicted that eventually "the decision will become a relic."[305]

2. *New York in the Lower Courts*

There have been significant efforts to apply the anticommandeering principle to federal legislation affecting the states. At this point I consider two representative areas.[306] The most conspicuous failure came in the "Motor-Voter" litigation, notably *Voting Rights Coalition v. Wilson*.[307] The National Voter Registration Act of 1993[308] is a somewhat complex statute which requires states to increase citizens' opportunities to register for federal elections in a number of circumstances, including when applying for a driver's license and doing business in governmental offices dealing with welfare or unemployment.[309] This is a clear commandeering of state processes. However, the Constitution, while vesting initial power over federal elections in the states, provides that "the Congress may at any time by Law make or alter such [state] Regulations, except as to the Places of chusing Senators."[310]

California invoked *New York* on the federal conscription issue, but the Court of Appeals for the Ninth Circuit viewed Congress's specific power over elections as distinct from the commerce power. The former, unlike the latter, "empowers Congress to impose on the states precisely the burden at issue."[311] The particularity of this constitutional language may limit this decision's impact on the general importance of *New York*. In addition, the court expressed federalism concerns over burdens on California's procedures for regulating its

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302 *See New York*, 505 U.S. at 159.

303 *See* Hoke, *supra* note 272, at 540-50.

304 *See* Mark Tushnet, *Why the Supreme Court Overruled* National League of Cities, 47 VAND. L. REV. 1623, 1652 (1994) (concluding that *New York* is "unlikely . . . to be the foundation of a useful constitutional law of federalism"). *See generally* Evan H. Caminker, *State Sovereignty and Subordinancy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001 (1995) (providing a detailed analysis of *New York* and a critique of the anticommandeering principle).

305 Tushnet, *supra* note 304, at 1653.

306 The anticommandeering principle has the potential to extend to a broad range of subjects, particularly if it is not limited to legislative actions.

307 60 F.3d 1411 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 815 (1996).

308 42 U.S.C. § 1973 gg-1-10 (1994).

309 *See Voting Rights Coalition*, 60 F.3d at 1413.

310 U.S. CONST. art. I, § 4.

311 *Voting Rights Coalition*, 60 F.3d at 1415.

own registration process.[312] Still, the case shows that a state's reliance on *New York* may not carry the day.[313] California won a partial rhetorical victory, and the holding can be distinguished, but as a practical matter registration procedures for federal elections will probably apply to state elections as well. If the "Motor-Voter" litigation represented the only body of case law applying *New York*, *New York*'s importance thus far would be primarily at the doctrinal level.[314]

A more complex picture emerges from cases involving challenges to the interim provisions of the Brady Act.[315] This legislation establishes a system of background checks for firearms purchasers in certain states.[316] During an interim period, local law enforcement officials are to perform these checks. Thus, there is a federal commandeering of a part of the mechanisms of state political subdivisions, a potential violation of the principles of *New York*. The district courts have been receptive to this argument.[317] However, in *Mack v. United States*,[318] the Court of Appeals for the Ninth Circuit rejected it. The majority was able to distinguish *New York* on the specific ground that the Brady Act does not commandeer *legislative* processes,[319] but the opinion appears to rest on the broader conclusion that *New York* is not a major generative case. The court emphasized that *Garcia* is still the guiding precedent in the area of federalism-based limits on the national government.[320] The Ninth Circuit essentially treated *New York* as a narrow exception to *Garcia*,[321] applicable only in cases of "federal coercion of a State's enactment of legislation or regulations, or creation of an administrative program."[322] The court also engaged in a

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312 *See id.* at 1416.

313 Advocates of devolution viewed the "Motor-Voter" litigation as the source of a potentially important victory. *See* Reuben, *supra* note 7, at 79 (relating the litigation to the "unfunded mandates" issue). However, the lower courts have not been receptive to their arguments. In addition to *Voting Rights Coalition*, see *Condon v. Reno*, 913 F. Supp. 946 (D.S.C. 1995); *Association of Community Org. for Reform Now v. Miller*, 912 F. Supp. 976 (W.D. Mich. 1995).

314 Even if this is all *New York* accomplishes, it is important that the national political dialogue take place with the background understanding that federalism limits are real. Such an understanding could certainly affect any debate over national health care legislation, as Professor Hoke demonstrates convincingly. *See* Hoke, *supra* note 272, at 550-73.

315 18 U.S.C. § 922(s) (1994).

316 *See* Mack v. United States, 66 F.3d 1025, 1027-28 (9th Cir. 1995) (describing the statutory scheme), *cert. granted sub nom.* Printz v. United States, 116 S. Ct. 2521 (1996).

317 *See, e.g.*, Romero v. United States, 883 F. Supp. 1076 (D. La. 1995) (holding such federal activity to be unconstitutional). *See also* Frank v. United States, 860 F. Supp. 1030 (D. Vt. 1994) (same).

318 *Mack*, 66 F.3d 1025.

319 *See id.* at 1030-31.

320 *See id.* at 1029 & n.6.

321 *See id.* at 1030.

322 *Id.* at 1031.

degree of balancing, noting the slight degree of national intrusion,[323] and indicated an unwillingness to review the national political process to see if it had protected the states from overreaching by the federal government.[324]

The Court of Appeals for the Fifth Circuit reached the opposite result. Its decision in *Koog v. United States*[325] struck down the interim provision requiring local law enforcement to perform background checks. The court relied heavily on *New York* and on the concept of "implied limitations" on national power.[326] It viewed the background check requirement as "tantamount to forced state legislation."[327] The changes add to the duties that state law imposes on the relevant officials and, in effect, alter that law. The Fifth Circuit viewed the Brady Act as "undermin[ing] state sovereignty"[328] and "blur[ring] accountability for" policy choices.[329] This obvious disagreement with the Ninth Circuit[330] goes beyond the specifics of the Brady Act to the broader issue of *New York's* doctrinal significance. The Fifth Circuit, at least, is willing to read the case broadly as it demonstrated once again one month after *Koog*. In *Acorn v. Edwards*,[331] the court struck down part of the Lead Contamination Control Act[332] because the statute required states to establish programs to remove lead contaminants from school and day-care drinking water systems.

As is the case with *Lopez*, the direct precedential force of *New York* is uncertain. However, the Supreme Court took a potentially major step toward clarifying this uncertainty when it granted certiorari in *Mack* to review the conflict among the circuits over the Brady Act.[333] There is a lot at stake. The Court might confine *New York* to the narrow context of commandeered legislation. On the other hand, the case presents an excellent vehicle to extend the notion of external limits on federal power. The Brady Act takes local personnel away

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323 *See id.* at 1031-32 (accepting the possibility "that there is likely to be some point at which a federal statute that enlists the aid of state employees can become so burdensome to the State that it violates the Tenth Amendment").

324 *See id.* at 1033 n.10.

325 79 F.3d 452 (5th Cir. 1996).

326 *Id.* at 455. The court stated the issue in the following terms:

> We now must decide whether the interim provision, when measured against *New York*'s guiding principles, encroaches on the sovereignty of the States in violation [of] the Tenth Amendment, either by forcing the States to administer a federal regulatory program or by compelling the States to enact state legislation according to a federal formula.

Id. at 457.

327 *Id.* at 458.

328 *Id.* at 460.

329 *Id.*

330 *See id.* at 461-62 (outlining disagreement with Ninth Circuit opinion in *Mack*).

331 81 F.3d 1387 (5th Cir. 1996).

332 42 U.S.C. § 300(j)-24(d) (1994).

333 *See* Printz v. United States, 116 S. Ct. 2521 (1996).

from locally-prescribed duties, at local expense, precisely because the national government does not yet have its own system in place. A decision striking down the statute would not have a significant practical effect because a national system of background checks is scheduled to be in operation by 1998.[334] Its doctrinal impact would, however, be great. Emphasis on local choice would be a logical extension of *New York*. Emphasis on federal imposition of costs would sound a lot like *National League of Cities*. Either way, a decision declaring the Brady Act unconstitutional would substantially strengthen the notion that federal use of the commerce power to intrude upon the operations of state and local government is suspect.

3. *Seminole—More Than Just the Eleventh Amendment?*

The Court also struck down a congressional statute in *Seminole Tribe of Florida v. Florida*.[335] At issue were the complicated provisions of the Indian Gaming Regulatory Act.[336] The Act permits a tribe to sue a state in federal court if negotiations over a Tribal-State gaming contract have been unsuccessful.[337] Suits in federal courts against unconsenting states raise Eleventh Amendment problems.[338] The Court first considered whether it could avoid constitutional problems by statutory construction—a classic application of the "clear statement" approach.[339] It found the statute unambiguous on this point.

The Court next considered whether Congress could authorize such suits. Five Justices concluded that Congress could not. The Court recognized the breadth of national power under the Indian Commerce Clause.[340] An earlier decision appeared to hold that Congress's general power over interstate commerce allowed it to abrogate state immunity from suit in federal court.[341] However, the majority reconsidered and overruled that decision.[342] *Seminole* established that the abrogation power Congress possesses when implementing the Fourteenth Amendment does not extend to exercises of power over commerce under Article I, section 8.

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334 *See* Linda Greenhouse, *Justices Will Handle Dispute Over Investigating Gun Buyers*, N.Y. TIMES, June 18, 1996, at A20.

335 116 S. Ct. 1114 (1996).

336 25 U.S.C. § 2710-2721 (1994).

337 *See Seminole*, 116 S. Ct. at 1119-20 (describing the statutory mechanism).

338 *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION §§ 7.1 to 7.7 (2d ed. 1994) (outlining Eleventh Amendment doctrine).

339 *See Seminole*, 116 S. Ct. at 1123-24.

340 U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to "regulate Commerce . . . with the Indian Tribes").

341 *See* Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), *overruled by* Seminole Tribe of Fla. v. Florida, 116 S. Ct. 1114 (1996).

342 *See Seminole*, 116 S. Ct. at 1128.

Eleventh Amendment doctrine is, to put it mildly, arcane. It would be a mistake, however, to relegate *Seminole* to the footnotes of federal courts. The decision is an important statement about federalism and a sharp manifestation of the conflicting views within the Court about the nature of sovereignty within the American federal union. For the majority, "each State is a sovereign entity in our federal system."[343] Being sued by one of its citizens in federal court represents an "'indignity.'"[344] The dissenters, however, saw the matter differently. According to Justice Stevens, "the sovereignty of the individual States is subordinate both to the citizenry of each State and to the supreme law of the federal sovereign."[345] Justice Souter's dissent explores at some length the historical dimensions of the sovereignty issue.[346]

What *Seminole* represents, in part, is another important step in the current majority's elaboration of a post-*Lopez* vision of federalism. The states possess significant attributes of sovereignty. The Constitution recognizes, implicitly and explicitly, that that sovereignty imposes external limits on the national government's exercise of enumerated powers. Observers were quick to see this aspect of the case and to recognize its significance beyond the Eleventh Amendment context. The *New York Times* gave the decision page one treatment.[347] The next day, a scathing editorial—entitled "Lurching Toward States Rights"[348]—made the connection with *Lopez*. *The Times* cited *Seminole* as the latest example of the current majority's "revolutionary, indeed reactionary, interpretation of federalism, tilting the balance dangerously toward states' rights at the expense of federal power."[349] Constitutional federalism is alive and well, even if by a margin of one vote. One should not, however, fall into the trap of assuming that the Supreme Court can only enforce federalistic limits in constitutional cases.

4. *Gregory v. Ashcroft*—*A Crucial Step*

The Court's most important swing away from *Garcia* and towards a new Federalism[350] came in the purported statutory construction case

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343 *Id.* at 1122.

344 *Id.* at 1124 (quoting Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993)).

345 *Id.* at 1144 (Stevens, J., dissenting).

346 *Id.* at 1165-73 (Souter, J., dissenting).

347 Linda Greenhouse, *Justices Curb Federal Power to Subject States to Lawsuits*, N.Y. TIMES, March 28, 1996, at A1.

348 N.Y. TIMES, March 29, 1996, at A20.

349 *Id.* *See also* Greenhouse, *supra* note 334, at A20 (linking *Lopez* and *Seminole* as "two major constitutional rulings that have curbed Federal authority vis-à-vis the states").

350 It may be that each decade has its own "new federalism." The phrase achieved considerable prominence during the presidency of Richard Nixon, particularly in connec-

of *Gregory v. Ashcroft*.[351] In 1974, Congress amended the Age Discrimination in Employment Act (ADEA) to "include the States as employers."[352] The amendment also excluded a range of appointed policymaking officials from the definition of "employee."[353] At issue in *Gregory* was whether state judges are covered as employees, or exempt as policymakers. Writing for a majority of five, Justice O'Connor found the Act "at least ambiguous" on this point.[354] She then applied principles of "clear statement" to conclude that the language should be read as excluding judges from the ADEA.[355] The way Justice O'Connor brought these principles into the picture is a federalistic tour de force.

She began with a paean to the federal system: "As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government."[356] According to Justice O'Connor, federalism is not just in the Constitution; it is a fundamental structural means of securing important democratic values on a par with the principle of separation of powers.[357] Through decentralization, federalism ensures "citizen involvement" and "innovation" in government.[358] It also protects against tyranny by either level of government, at least so long as there is a "proper balance" between the two.[359] Because the federal government's Supremacy Clause trump card threatens the balance, the Court must assume that Congress "does not exercise lightly"[360] the ability to "impose its will on the States."[361]

Against this backdrop, Justice O'Connor viewed matters of state government structure as particularly important. "Through the struc-

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tion with his efforts to change federal grant programs to increase state power. *See* RICHARD P. NATHAN, THE PLOT THAT FAILED 13-34 (1975).

351 501 U.S. 452 (1991).

352 *Id.* at 464.

353 *See id.* at 465. The *Gregory* Court quoted from 29 U.S.C. § 630(f) (1988):

> "The term 'employee' means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office."

Id.

354 *Id.* at 470.

355 *See id.* (asserting that "we will not attribute to Congress an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its Commerce Clause powers or § 5 of the Fourteenth Amendment").

356 *Id.* at 457.

357 *Id.* at 458.

358 *Id.*

359 *Id.* at 459.

360 *Id.* at 460.

361 *Id.*

ture of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."[362] Because the ADEA, if applied to judges, would intrude deeply on government structure, it was appropriate to apply a requirement of "plain statement" before concluding that Congress intended for the Act to protect judges. This rule of strict construction would govern regardless of whether Congress had acted pursuant to the Commerce Clause or the Fourteenth Amendment.[363]

Labeling this approach one of statutory construction is a considerable understatement. It elevates to "quasi-constitutional" status[364] those areas where Congress must satisfy the plain statement requirement before it can regulate states. Justice White, in dissent, argued that this "attempt to carve out areas of state activity that will receive special protection from federal legislation"[365] was directly contrary to *Garcia*.[366] Perhaps the majority recognized that *Garcia*'s invitation to review the national political process to see if there had been a failure to consider state interests[367] was a hollow one. What *Gregory* amounts to is a form of indirect review through the imposition of special requirements on legislation dealing with particular subjects. The result is, nonetheless, a set of judicially enforceable federalism-based limits on statutes dealing with those subjects.

Taken together, *Gregory*, *New York*, and *Seminole* demonstrate the continuing vitality of the notion of external limits. Along with *Lopez*, they show the desire of several Justices to emphasize dual federalism as a general guiding concept. Moreover, these decisions do not stand alone. One must also consider the important federalism dimensions of *U.S. Term Limits, Inc. v. Thornton*,[368] even though it is not a case about external limits on federal power.

5. *Term Limits and Federalism—Broader Implications of* Thornton

Thornton presented important federalism questions in the somewhat unusual context of a state attempt to exercise power over the

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362 *Id.*

363 *See id.* at 470.

364 *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992), *cited in* Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959, 1960 n.6 (1994).

365 *Gregory*, 501 U.S. at 477 (White, J., concurring in part and dissenting in part).

366 *See id.* (White, J., concurring in part and dissenting in part).

367 *See id.* at 464. *See also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 588 (1985) (O'Connor, J., dissenting) (asserting that "[w]ith the abandonment of *National League of Cities* [by *Garcia*], all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint").

368 115 S. Ct. 1842 (1995).

national legislature. Arkansas, along with numerous other states,[369] had imposed limits on the number of terms members of its congressional delegation could serve.[370] Affirming the Arkansas Supreme Court,[371] the Supreme Court held in a 5-to-4 decision that state-imposed qualifications on federal representatives violate the Qualifications Clause of the Constitution.[372] Beyond this specific invalidity, the Court condemned state-imposed term limits as violating fundamental principles of democracy[373] and as "inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States."[374] Both the majority and the dissent discussed extensively the Tenth Amendment and issues of state power in a federal system.[375] Justice Stevens, for the majority, viewed the Tenth Amendment as reserving to the states only those powers that they possessed prior to the formation of the United States.[376] Since the federal government did not exist in the preconstitutional period, no power over its representatives could be reserved to the states.[377] According to Justice Thomas, in dissent, the scheme of the Constitution is that "the Federal Government enjoys no authority beyond what the Constitution confers,"[378] and all other governmental authority belongs to the states.

What is crucial about *Thornton*, especially for the purposes of this Article, is that the clash of views and visions within its pages extends far beyond the issue of term limits to fundamental questions of federalism. As Professor Kathleen Sullivan puts it, "*Term Limits* is best read as a preview of the Court's response to other coming controversies over the relative reach of state and federal power."[379] Both the majority opinion and the dissent, as well as Justice Kennedy's concurrence,[380] can be read as endorsements of dual federalism. Justice Stevens, for example, emphasizes the role of national legislators as part of the national government—a role which essentially places them beyond the reach of states.[381] In a sense, Justice Stevens uses Justice O'Connor's earlier emphasis on the fact that the Constitution permits

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369 *See* Sullivan, *supra* note 8, at 78 n.1.

370 *See id.* at 78; *Thornton*, 115 S. Ct. at 1845-46.

371 *See id.* at 1845.

372 *See id.*

373 *See id.*; *see also id.* at 1850-51 (drawing from *Powell v. McCormack*, 395 U.S. 486 (1969)).

374 *Id.* at 1845.

375 *See, e.g., id.* at 1854-56; *id.* at 1875-77 (Thomas, J., dissenting).

376 *See id.* at 1854.

377 *See id.* at 1855-56.

378 *Id.* at 1876 (Thomas, J., dissenting).

379 Sullivan, *supra* note 8, at 81.

380 *See Thornton*, 115 S. Ct. at 1872-75 (Kennedy, J., concurring).

381 *See, e.g., id.* at 1858-59 (asserting that "[g]iven the Framers' wariness over the potential for state abuse, we must conclude that the specification of fixed qualifications in the

the national government to act directly upon citizens against her.[382] Justice O'Connor's conclusion was that Congress should not, and need not, commandeer state legislatures when it can do the regulatory job itself. Justice Stevens's point is that precisely because these national legislators are national, they must remain beyond the range of state authority in such essential matters as their qualifications to serve. Both views reinforce the notion that each government has a sphere within which it is sovereign.

As for Justice Kennedy, he sided with the majority on precisely such dual federalism grounds. For him, as for Justice Stevens, federalism would be threatened by state acts encroaching upon the national "political capacity."[383] However, he makes explicit what is at best implicit in the Stevens analysis: "That the States may not invade the sphere of federal sovereignty is as incontestable, in my view, as the corollary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States."[384] Moreover, as Professor Sullivan notes, one must conclude that Justice Kennedy remains committed, as he stated in *Lopez*,[385] to judicial intervention "to protect each side from encroachment by the other."[386] Finally, the extensive presence of the Tenth Amendment in *Thornton* is significant. Justice Stevens, surely no fan of the provision, spends fourteen pages—and utilizes sources ranging from the *Federalist* to the *Gettysburg Address*—rebutting arguments based on it.[387] For Justice Thomas, of course, the Tenth Amendment is central to the Constitutional framework.[388]

The recent decisions, and the *Thornton* dissent, represent a significant step back from *Garcia* toward the rehabilitation of the *National League of Cities*' notion that there exists an inviolable zone of state sovereignty.[389] Indeed, in *Thornton*, Justice Thomas cited *National League*

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constitutional text was intended to prescribe uniform rules that would preclude modification by either Congress or the states").

382 *See id.* at 1855 (citing FERC v. Mississippi, 456 U.S. 742 (1982)). Justice O'Connor elaborated on her view that the Constitution permits the national government to act directly upon citizens in her majority opinion in *New York v. United States*, 505 U.S. 144, 163-66 (1992).

383 *Thornton*, 115 S. Ct. at 1872 (Kennedy, J., concurring) (asserting that "[i]t was the genius of [the Framers'] idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other").

384 *Id.* at 1873 (Kennedy, J., concurring) (citing United States v. Lopez, 115 S. Ct. 1624 (1995)).

385 *Lopez*, 115 S. Ct. at 1637-39.

386 Sullivan, *supra* note 8, at 103.

387 *See Thornton*, 115 S. Ct. at 1854-67.

388 *See id.* at 1876-80 (Thomas, J., dissenting).

389 *See* Hoke, *supra* note 272, at 529 (interpreting *New York* as a movement away from *Garcia* and a revival of the Tenth Amendment's justiciability). *Cf.* Sullivan, *supra* note 8, at 105 ("The *Term Limits* dissent might lay the groundwork for a revival of the doctrine of

of Cities as if it were still good law.[390] Whether things have reached this point is not clear, but post-*Lopez* analysis calls into question national laws that intrude upon the basic institutions of state government. Such laws can now be attacked as impermissible federal regulation of those institutions. Thus, the possibility of external limits on federal anticorruption statutes applicable to state and local governments needs to be addressed. The fact that federalism-based challenges have not generally succeeded in the past[391] may not be dispositive in the future.

C. External Limits and Federal Anticorruption Statutes—The Case for Validity

With respect to external limits, the case most directly on point is *New York v. United States*.[392] However, the federal anticorruption statutes do not fit easily under the commandeering of state resources label. Although they apply to individual state officials, including legislators, and thus affect the state government in a general sense,[393] they do not require state legislatures to do anything. In addition, these statutes do not impose a financial burden on states.[394] However, one should not proceed as if *New York* were the final word on federal regulation of states.[395] The case's broad thrust is a general endorsement of dual federalism coupled with a more specific emphasis on the notion that "[s]tates are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government."[396] Even if federal criminal statutes aimed at state and local governments do not commandeer state powers or resources, there is a basic incompatibility between the assumption underlying such statutes—that the superior level may po-

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National League of Cities, a repudiation of *Garcia*, or at least an extension of *New York* to new contexts.").

390 *Thornton*, 115 S. Ct. at 1878 (Thomas, J., dissenting).

391 *See, e.g.*, United States v. Silvano, 812 F.2d 754, 758-59 (1st Cir. 1987) (discussing and rejecting federalism arguments as well as citing other cases reaching same result).

392 505 U.S. 144 (1992).

393 It is, of course, possible to argue that prosecution of individual *officials* does not regulate the *states* at all. *See* United States v. Thompson, 685 F.2d 993, 1000-01 (6th Cir. 1982). In my view, the prosecution is inescapably a federal judgment about, and an intrusion into, the working of state government. The prosecutors are neither state officials nor private citizens, as in a § 1983 suit, and the source of law is usually not state law.

394 In her very helpful analysis of *New York*, Professor Hoke emphasizes the decision's impact on federal attempts to commandeer state resources to prevent depletion of the federal treasury. Hoke, *supra* note 272, at 538, 542, 550.

395 *Cf.* Tushnet, *supra* note 304, at 1652-55 (expressing the view that *New York* is unlikely to have significant force as a federalism decision).

396 *New York*, 505 U.S. at 188.

lice the inferior one—and the federalistic implications of Justice O'Connor's opinion.[397]

Despite *New York*'s implications for the protection of state sovereignty, however, there is language in the opinion that makes a fundamental distinction between the type of statute at issue in the case and federal anticorruption laws. Justice O'Connor emphasized that *New York* was "not a case in which Congress has subjected a State to the same legislation applicable to private parties."[398] A congressional requirement that a state pass a law has its direct effect, at least initially, only on state legislatures.[399] However, bribery, extortion, and mail fraud through dishonest services are crimes that may be committed by private citizens as well as public officials.[400] Once again, a narrow reading of *New York* suggests that anticorruption statutes are not vulnerable to external limits on congressional power.

Limiting the case's principles to statutes aimed directly at state legislatures will, indeed, keep *New York* within narrow bounds. It is precisely for this reason that the limitation may not last. Justice O'Connor appears to have relied on it mainly to distinguish adverse precedent in which the Court had upheld federal statutes that regulated both state and private entities.[401] Even in *New York* itself, the line was questionable.[402] *New York*'s logic extends beyond commands addressed to legislatures. The notion of "'a residuary and inviolable sovereignty'"[403] can certainly reach federal criminal regulation of the manner in which state officials govern sovereign states. The case is a reaffirmation of state sovereignty that may presage a return to *National League of Cities*.[404] Thus, it seems desirable to examine the possible impact of that case on the anticorruption statutes.

The essence of *National League of Cities* is that there are constitutional limits on the federal government's ability to regulate "the States as States."[405] This approach represents a zonal, or territorial, view of state sovereignty.[406] Prosecutions of state officials might well fit within the immune area. However, the zonal approach presents serious ana-

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397 *See id.* at 162-63.

398 *Id.* at 160.

399 Obviously, there can be substantial, fairly direct, effects on regulated interests, as in the case of the hazardous waste statute at issue in *New York*.

400 *See, e.g.*, Carpenter v. United States, 484 U.S. 19 (1987); Perrin v. United States, 444 U.S. 37 (1979).

401 *See New York*, 505 U.S. at 160.

402 *See id.* at 201-04 (White, J., concurring in part and dissenting in part).

403 *Id.* at 188 (quoting THE FEDERALIST No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)).

404 *See id.* at 201 (White, J., concurring in part and dissenting in part).

405 National League of Cities v. Usery, 426 U.S. 833, 845 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

406 *See* Merritt, *supra* note 43, at 1564-66.

lytical difficulties. A particular problem with this concept is that it is hard to delineate many spheres that the federal government may *not* enter if the national interest is strong enough. It is no doubt true that Congress cannot pass a statute directing the location of a state's capital,[407] but this is not the daily fare of government. Areas as diverse as environmental regulation, civil rights, and job safety are full of accepted federal incursions on state sovereignty.[408]

Apart from the incursion problem, there is the initial conceptual difficulty of identifying the protected areas of state activity. Concepts such as regulating the "States as States,"[409] identifying indisputable "attributes of state sovereignty,"[410] and structuring "integral operations"[411] have proved hard to apply. In *Garcia*, when the Court's advocates of national power mustered the votes to overrule *National League of Cities*, the majority criticized the earlier opinion as "unsound in principle and unworkable in practice."[412] In dissent, Justices Rehnquist and O'Connor predicted that the case would rise again.[413] Even if correct, the prediction need not mean that the second version will be the same as the first.

Justice Blackmun, in his concurring opinion, may have hit upon the best way to make *National League of Cities* work:[414] a balancing test focusing on the extent of federal interest and the need for state compliance.[415] Before it was overruled, the *National League of Cities* approach evolved into a multi-factor balancing test.[416] There are

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407 *See* Coyle v. Smith, 221 U.S. 559 (1911).

408 *See National League of Cities*, 426 U.S. at 880-81 (Stevens, J., dissenting).

409 Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 537 (1985) (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 287-88 (1981)).

410 *Id.* (quoting *Hodel*, 452 U.S. at 287-88).

411 *Id.* (quoting *Hodel*, 452 U.S. at 287-88).

412 *Id.* at 546.

413 *See id.* at 580 (Rehnquist, J., dissenting); *id.* at 589 (O'Connor, J., dissenting).

414 *See National League of Cities*, 426 U.S. at 856 (Blackmun, J., concurring).

415 *See id.* (Blackmun, J., concurring) ("[T]he Court's opinion . . . adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential.").

416 *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 287-88 (1981).

The Brady Act problem currently before the Court, *see* Mack v. United States, 66 F.3d 1025 (9th Cir. 1995), *cert. granted sub nom.* Printz v. United States, 116 S. Ct. 2521 (1996), may lead to additional consideration of a balancing approach. A good example of this possibility is the opinion of the Second Circuit upholding the Act in *Frank v. United States*, 78 F.3d 815 (2d Cir. 1996). The *Frank* court stated that, as a general matter, "the severity of the burden placed on states is the touchstone for determining whether national legislation is so onerous as to threaten the effectiveness of the States in our federal system." *Id.* at 826. After examining the burdens imposed on local officials, the court concluded that the effort required of them "is minimal, and the Act is therefore not unconstitutional by virtue of the magnitude of the burden." *Id.* at 831.

problems with any balancing test,[417] and the question of whether state interests could trump federal interests if both were strong remains. The *National League of Cities* majority was troubled by federal requirements that "significantly alter or displace"[418] state choices concerning "integral operations in areas of traditional governmental functions."[419] This language suggests that the state interest might be strong enough to prevail even if the inquiry is rephrased as one of balancing. Of course, if some interests are absolute, identifying them may not equate to balancing. Despite this uncertainty, a balancing approach may be a more workable approach to resurrecting *National League of Cities* than a zonal concept.

Let us assume that the Court will utilize some form of balancing in identifying external limits on federal power over state governments, and that corruption prosecutions trigger the inquiry into external limits. There are strong national interests in combating state and local corruption.[420] As noted, these include the need to preserve confidence in government generally, the importance of state political processes as entryways to the national process, and the federal government's concern for viable state competitors to check federal dominance. Whether or not these arguments rise to the level of support for the existence of a constitutional power, they should weigh heavily on the national side in a balancing process that focuses on how external, federalism-based limits operate on an enumerated power, the existence of which is not in dispute.

In applying a balancing test to federal anticorruption statutes, substantial arguments weigh on the state's side, beyond a general post-*Lopez* tilt in favor of dual federalism. Again, *New York* is the key guide to the inquiry. Justice O'Connor emphasized accountability, and in particular, the ability of state citizens to determine whether the state or federal government was responsible for a particular program.[421] Accountability of public officials at the state level may be blurred if officials at the federal level are setting and enforcing the standards for official misconduct by state officials.[422] Applying federal standards may displace state choices as to how to handle particular problems as well as reducing the incentives for state officials to do their own polic-

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417 *See* Tushnet, *supra* note 304, at 1636-38; *cf.* Caminker, *supra* note 304, at 1019 (interpreting Justice O'Connor's concept of sovereignty as precluding balancing).

418 *National League of Cities*, 426 U.S. at 851.

419 *Id.* at 852. Under *Hodel*, a court would inquire whether "the nature of the federal interest . . . justifies state submission." 452 U.S. at 288 n.29. Thus the inquiry had lost much of its pro-state tilt.

420 *See supra* text accompanying notes 124-33.

421 *See* New York v. United States, 505 U.S. 144, 168-69 (1992).

422 *See* Moohr, *supra* note 2, at 175. *But see* Carey et al., *supra* note 126, at 314 (emphasizing necessity of federal prosecution).

ing.[423] As Geraldine Moohr points out, the long-term diminution of the willingness of state citizens to effectuate reform themselves may outweigh the short-term gains from federal prosecution.[424] As in other areas, states' responses to corruption may serve important "laboratory" functions.[425] Views about what is appropriate behavior by governmental officials differ. Differences of views are a large part of what federalism is about; it permits, and encourages, diversity of outcomes. With respect to official behavior, states may legitimately disagree about standards of conduct in a range of areas,[426] severity of punishment,[427] or whether to utilize criminal or civil sanctions.[428]

Viewing the matter as a state ethics official, however, I believe it is wrong to assume that the state interests argue solely against the federal presence. Federal enforcement can play an important, even crucial, role. The problem is not a lack of state laws on the subject of government misconduct.[429] As early as 1974, thirty-eight states had enacted conflict of interest legislation.[430] All states outlaw bribery in the public sector.[431] At least twenty-nine states have established ethics

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423 *See* ABRAMS & BEALE, *supra* note 59, at 248.

424 Moohr, *supra* note 2, at 186-87.

425 *See generally* United States v. Lopez, 115 S. Ct. 1624, 1641 (1995) (Kennedy, J., concurring) (discussing role of states "as laboratories for experimentation to devise various solutions" to problems).

426 For example, there may be a wide range of disagreement about how strictly to enforce "revolving door" restrictions on former government employees who seek to deal with government. For a discussion of revolving door issues see George D. Brown, *The Constitution as an Obstacle to Government Ethics—Reformist Legislation After* National Treasury Employees Union, 37 WM. & MARY L. REV. 979, 1013-18 (1996).

427 MASSACHUSETTS SPECIAL COMM'N ON ETHICS FINAL REPORT 26-7 (1995) (recommending greater use of private and non-monetary sanctions) [hereinafter MASS. SPECIAL COMM'N REPORT].

428 *See, e.g.*, MASS. GEN. LAWS ANN. ch. 268B, § 3(i) (West 1995) (directing State Ethics Commission to serve as "the primary civil enforcement agency" for state's conflict of interest and related statutes).

429 *But see* Kurland, *supra* note 39, at 377 ("[I]n many cases state anticorruption statutes have been ineffective or virtually nonexistent."). *Cf.* Carey et al., *supra* note 126, at 304-09 (describing limits on state prosecutorial capacity). The same authors argue that federal initiatives have prompted state laws. *Id.* at 316.

430 Kevin V. McAlevy, Note, *Conflicts of Interest and State Legislatures: Virginia as a Case Study*, 5 J.L. & POL. 209, 213 (1988).

431 ALA. CODE § 13A-10-61 (1995); ALASKA STAT. § 11.56.110 (Michie 1995); ARIZ. REV. STAT. ANN. § 13-2602 (1995); ARK. CODE ANN. § 5-52-103 (Michie 1995); CAL. PENAL CODE § 68 (West 1995); COLO. REV. STAT. § 18-8-302 (1995); CONN. GEN. STAT. § 53a-148 (1995); DEL. CODE ANN. tit. 11, § 1203 (1995); D.C. CODE ANN. § 22-712 (1995); FLA. STAT. ch. 838.015 (1994); GA. CODE ANN. § 16-10-2 (1995); HAW. REV. STAT. § 710-1040 (1995); IDAHO CODE § 18-1352 (1995); 720 ILL. REV. STAT. § 5/33-1 (West 1995); IND. CODE ANN. § 35-44-1-1 (West 1995); IOWA CODE ANN. § 722.1 (West 1995); KAN. STAT. ANN. § 21-3901 (1995); KY. REV. STAT. ANN. § 521.020 (Banks-Baldwin 1994); LA. REV. STAT. ANN. § 14-118 (West 1996); ME. REV. STAT. ANN. tit. 17-A, § 602 (West 1995); MD. CRIM. LAW ANN. CODE, art. 27, § 22 (1995); MASS. GEN. LAWS ANN. ch. 268A, § 2 (West 1995); MICH. COMP. LAWS ANN. § 750.117 (West 1996); MINN. STAT. ANN. § 609.42 (West 1996); MISS. CODE ANN. § 97-11-11 (1995); MO. REV. STAT. § 576.010 (1996); MONT. CODE ANN. § 45-7-101 (1995);

commissions or similar bodies.[432] Financial disclosure laws are also prevalent.[433] The problem lies in the realm of enforcement. As a general matter, there are inherent limits on the ability of state entities to enforce the law against other state entities.[434] State governments are usually close-knit societies.[435] The potential enforcer and enforcee are often located in the same building or complex of buildings. The former may depend on the latter for funding or for its very existence. One may view these cultural observations as somewhat abstract, but they have a substantial real-world dimension.

In recent years, for example, the Massachusetts Legislature has entertained attempts to abolish the State Ethics Commission, reduce its funding substantially, and curtail its investigatory powers.[436] Although such frontal assaults are usually unsuccessful, there is a Perils-of-Pauline quality about the world of state ethics enforcement. In 1994, the Massachusetts Supreme Judicial Court ruled that the State Ethics Commission lacked the power to compel testimony during its "preliminary inquiry" into a matter.[437] Efforts to persuade the Legislature to overturn the decision have been treated as dead on arrival.[438] Viewed from this perspective, an alternative to state enforcement mechanisms may be necessary,[439] and federal efforts to enforce standards of governmental honesty can therefore be seen as advancing important state interests. Thus, as a general matter, a post-*National*

NEB. REV. STAT. § 28-917 (1990); NEV. REV. STAT. ANN. § 197.020 (Michie 1992); N.H. REV. STAT. ANN. § 640:2 (1986); N.J. STAT. ANN. § 2C:27-2 (West 1995); N.M. STAT. ANN. § 30-24-2 (Michie 1994); N.Y. PENAL LAW § 200.00 et seq. (McKinney 1996); N.C. GEN. STAT. § 14-217 (1993); N.D. CENT. CODE 12.1-12-01 (1995); OHIO REV. CODE ANN. § 2921.02 (Banks-Baldwin 1993); OKLA. STAT. ANN. tit. 21, § 382 (West 1996); OR. REV. STAT. § 162.025 (1990); 18 PA. CONS. STAT. ANN. § 4701 (West 1983 & Supp. 1996); R.I. GEN. LAWS § 11-7-3 (1994); S.C. CODE ANN. § 16-9-220 (Law. Co-op. 1995); S.D. CODIFIED LAWS § 22-12A-7 (Michie 1988); TENN. CODE ANN. § 39-16-102 (1995); TEX. PENAL CODE ANN. § 36.02 (West 1994); UTAH CODE ANN. § 76-8-103 (1995); VT. STAT. ANN. tit. 13, § 1102 (1995); VA. CODE ANN. § 18.2-439 (Michie 1995); WASH. REV. CODE ANN. § 9A.68.010 (West 1996); W. VA. CODE § 61-5A-3 (1995); WIS. STAT. ANN. § 946.10 (West 1995); WYO. STAT. ANN. § 6-5-102 (Michie 1995).

432 *See* STATESIDE ASSOCIATES, INC., ETHICS RULES OF THE FIFTY STATES 1995 (unpaginated).

433 *See* Note, *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1660 n.72 (1984).

434 Kurland, *supra* note 39, at 377-78.

435 *See* George D. Brown, *Binding Advisory Opinions: A Federal Courts Perspective on the State School Finance Decisions*, 35 B.C. L. REV. 543, 555 (1994).

436 *See* Brian C. Mooney, *Old Ways Die Hard in the Legislature*, BOSTON GLOBE, Aug. 15, 1995, at 15; *cf.* Carey et al., *supra* note 126, at 312 (detailing the legislative weakening of the West Virginia Ethics Commission's authority).

437 *See* State Ethics Comm'n v. Doe, 631 N.E.2d 37, 38 (Mass. 1994).

438 *See* Brian C. Mooney, *Flaherty Send-Off Worthy of a Viking*, BOSTON GLOBE, June 15, 1996, at 15 ("A full year has passed and the bill still gathers dust in the House clerk's office."). As of this writing, a legislative hearing is anticipated in 1997.

439 This situation might be viewed as an example of Professor Little's principle of demonstrated state failure. *See supra* text accompanying notes 120-23.

League of Cities balancing test could well come out in favor of federal anticorruption statutes. Different statutes, however, may fare differently.

D. The Mail Fraud Dilemma—Is This Statute an Affront to Both Post-*Lopez* and Process Federalism?

One of the aspects of the mail fraud statute that critics most frequently denounce is its extraordinary breadth.[440] In the context of a balancing inquiry, the fact that prosecutions under the statute can have a far more intrusive effect on state governments than those brought under the Hobbs and Travel Acts may be of particular importance. The latter are, at least in theory, limited to defined concepts such as "bribery" and "extortion."[441] Honest services, by contrast, knows few limits. General statements to this effect abound. One federal court of appeals referred to the statute as aimed at "schemes deemed contrary to *federal public policy*."[442] A frequent formulation of what this policy means is found in the following guidelines from another circuit court: schemes that "are contrary to public policy and fail to measure up to accepted moral standards and notions of honesty and fair play."[443] The same court indicated that the search for the law is not limited by any "state or federal statute or [the] common law."[444] The result is a kind of federal common law of the sort that flourished in the civil context under *Swift v. Tyson*.[445] *Erie*[446] curtailed that approach to civil cases. Federal common law crimes are even more suspect,[447] although the process of "interpreting" broad criminal statutes can lead to their creation. That is one reason for limiting this process.

Numerous specific decisions bear out these general observations about the scope of honest services. Cases using mail fraud theories to prosecute irregularities in the elections process, such as failure to disclose campaign contributions from an underworld figure,[448] may be beyond the reach of other federal anticorruption statutes.[449] In

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440 *See, e.g.*, United States v. Margiotta, 688 F.2d 108, 143 (2d Cir. 1982) (Winter, J., concurring in part and dissenting in part).

441 *See supra* text accompanying notes 143-50.

442 *Margiotta*, 688 F.2d at 124 (emphasis added).

443 United States v. Mandel, 591 F.2d 1347, 1360 (4th Cir.), *aff'd per curiam*, 602 F.2d 653 (4th Cir. 1979).

444 *Id.*

445 41 U.S. (16 Pet.) 1, 18, 19 (1842).

446 Erie R.R. v. Tompkins, 304 U.S. 64, 78-80 (1938).

447 *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 32-34 (1812) (rejecting the notion of federal courts' power to establish common law crimes). *But see infra* text accompanying notes 608-09 (discussing federal common law crimes under congressional delegation of authority).

448 *See, e.g.*, United States v. Schermerhorn, 713 F. Supp. 88 (S.D.N.Y. 1989).

449 *Cf.* McCormick v. United States, 500 U.S. 257, 272-73 (1991) (emphasizing the importance of avoiding judicial interference with campaign practices).

United States v. ReBrook,[450] prosecutors applied the honest services analysis (under the wire fraud statute) to a scheme by a state official to buy stock in a company which stood a good chance of landing a state contract. The defendant knew of the state contract because of his position as lawyer for the state agency involved.[451] The case certainly presented important issues under the federal securities laws (with the Fourth Circuit finding against the government)[452] but hardly qualified as an example of bribery or extortion. Thus, having the honest services doctrine available permitted a federal political corruption prosecution that might not otherwise have been brought.

The broad reach of the honest services doctrine is particularly important in the context of gratuities offenses. The gratuities offense typically encompasses payments to a public official, in order to foster possible favorable treatment, from a person who can benefit from that official's actions. Unlike the crime of bribery, there is no quid pro quo requirement that the payment be tied to a specific act.[453] Both the payor and the payee can be guilty of the crime.[454] Prosecutors may seek to fit gratuities cases under the label of "extortion" broadly construed.[455] However, the Supreme Court's decision in *Evans v. United States*[456] appears to read a quid pro quo requirement into the Hobbs Act.[457] It may still be possible to use the Travel Act's reference to "bribery . . . in violation of the laws of the State in which committed."[458] The theory is that Congress requires a state law that outlaws the payments in question, but the state need not call the offense "bribery,"[459] which is a federal term when used within a federal statute. Even a state gratuities statute would suffice.[460] This analysis is suspect, however. The Act appears to be a straightforward federal incorporation of state law. Even if one accepts a federal judicial role in defining the ultimate meaning of a federal statutory term, it seems particularly inappropriate to call gratuities offenses "bribery." Federal law itself,

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450 837 F. Supp. 162, 166-67 (S.D.W.Va. 1993), *modified*, 58 F.3d 961 (4th Cir.), *cert. denied*, 116 S. Ct. 431 (1995).

451 *See id.* at 170.

452 *See* United States v. ReBrook, 58 F.3d 961, 965-66 (4th Cir. 1995) (rejecting the application of the misappropriation theory of insider trading).

453 *See* ABRAMS & BEALE, *supra* note 59, at 225.

454 *See* 18 U.S.C. § 201(c) (1994).

455 *See* Evans v. United States, 504 U.S. 255, 260-63 (1992) (discussing expansion of the concept of extortion). In an extortion case, however, only the payee can be prosecuted.

456 *Id.*

457 *See id.* at 268-69; *see also id.* at 272 (Kennedy, J., concurring) (interpreting majority opinion to require a quid pro quo as an element of the case).

458 18 U.S.C. § 1952(b)(2) (1994). The Travel Act also incorporates state extortion laws. *Id.*

459 *See* United States v. Nardello, 393 U.S. 286, 293-94 (1969).

460 *See* United States v. Sawyer, 85 F.3d 713, 734 n.19 (1st Cir. 1996); United States v. Garner, 837 F.2d 1404, 1418 (7th Cir. 1987).

when dealing with federal officials, distinguishes between the two offenses.[461]

The recent case of *United States v. Sawyer*[462] demonstrates the importance of the honest services doctrine in applying the mail fraud statute to possible corruption at the state level. Sawyer was a lobbyist for an insurance company, a business heavily regulated by the state. He had engaged in extensive wining and dining of state legislators.[463] The federal government brought a classic gratuities case against him, utilizing the mail and wire fraud statutes as well as the Travel Act. If the Travel Act analysis offered here were to prevail, that statute would not be available. Such cases would be reduced to federal prosecutions for giving gratuities to state officials. However, no federal statute deals explicitly with this matter, although there is such a statute covering gratuities for federal officials.[464] Thus, the availability of the honest services theory plays a crucial role in such federal prosecutions. As the gratuities issue illustrates, the mail fraud statute reaches so deeply into state matters that a balancing inquiry might tip in the state's favor based on the degree of federal intrusiveness.

Interfering with state control of state officials is particularly offensive to the post-*Lopez* emphasis on state autonomy and accountability stressed in *New York*.[465] In addition to the degree of intrusion, one should note that the federal government's role in prescribing rules of honest services crosses the line between the classic criminal law and rules of government ethics. Although its precise location is not clear, such a line does exist.[466] Bribery and extortion are criminal law terms of long-standing applicability both to government officials and to citizens in general.[467] On the other hand, there is ongoing experimentation in the area of government ethics with such concepts as limits on the "revolving door"[468] and prohibition of "appearances" problems.[469] Whether and to what extent such forms of conduct should be pun-

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461 *See* 18 U.S.C. § 201 (1994). The First Circuit recently compounded the analytical problem by stating that some gratuities offenses are "bribery" for Travel Act purposes, but some may not be. *See Sawyer*, 85 F.3d at 741 n.28.

462 878 F. Supp. 279 (D. Mass. 1995), *vacated*, 85 F.3d 713 (1st Cir. 1996).

463 *See id.* at 281.

464 *See* 18 U.S.C. § 201(c) (1994).

465 *See* Merritt, *supra* note 43, at 1570-73.

466 *See* McCormick v. United States, 500 U.S. 257, 273 (1991) (distinguishing between "ethical considerations and appearances" and "the federal crime of extortion"); McNally v. United States, 483 U.S. 350, 366 (1987) (Stevens, J., dissenting).

467 Thus, in *Evans v. United States*, 504 U.S. 255 (1992), the Justices disagreed over the meaning of extortion, but not about the venerability of the concept.

468 *See, e.g.*, Ann McBride, *Ethics in Congress: Agenda and Action*, 58 GEO. WASH. L. REV. 451, 470-74 (1990).

469 *See, e.g.*, Peter W. Morgan, *The Appearance of Propriety: Ethics Reform and the Blifil Paradoxes*, 44 STAN. L. REV. 593, 595-603 (1992).

ished are topics of intense debate.[470] The area is an ideal one for state experimentation. As noted, this kind of "laboratory" federalism is one of the values of the dual system that *Lopez* emphasizes. Justice Kennedy's concurring opinion was explicit on this point.[471] Allowing state-by-state development of ethical norms represents an additional reason why federal use of the honest services doctrine may simply go too far in the post-*Lopez* era.

The analysis to this point of federal anticorruption efforts aimed at state and local officials has focused on the impact of *Lopez* and similar cases. In the post-*Lopez* era, *Garcia*'s model of process federalism may well be dead,[472] but the case has not been overruled. Thus, it is worth considering how that model would apply to the mail fraud statute. *Garcia*'s majority rejected the notion of judicially-enforceable limits on national power in the following terms: "the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action."[473] As Professor Wechsler and others have argued,[474] there are a number of reasons to rely on the political, rather than the judicial, process to protect federalism values. The principal rationale—that Congress represents the states[475]—has weakened over time.[476] However, the visibility of the national political process may protect against major alterations of the federal system.[477] In addition, the slow and cumbersome nature of the process affords protection as well.[478] *Garcia*'s defenders on the Court have expressed concern about efforts to undermine it,[479] but the anti-*Garcia* Justices purport to observe it. For purposes of this Arti-

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470 *See generally* ABA Comm. on Gov't Standards (Cynthia Farina, Reporter), *Keeping Faith: Government Ethics & Government Ethics Regulation*, 45 ADMIN. L. REV. 287, 296-308 (1993) (describing the ethical considerations involved in public service and recommending regulations and other methods to address these considerations).

471 *See* United States v. Lopez, 115 S. Ct. 1624, 1641 (1995) (Kennedy, J., concurring).

472 *See* Merritt, *supra* note 43, at 1570-73 (noting that *New York* appears to represent the abandonment of process theory).

473 Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985).

474 *See, e.g.*, Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558-60 (1954).

475 *See Garcia*, 469 U.S. at 550-52 & n.11.

476 *See, e.g.*, Lewis B. Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 843, 862-67 (1979).

477 The inconclusive ending of the debate over national health care may represent, in part, an example of this phenomenon.

478 The same point can be made here as well, perhaps more strongly. "Gridlock," known more favorably as "checks and balances," serves to protect federalism interests as well as classic concerns for separation of powers.

479 *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 477 (1991) (White, J., concurring in part and dissenting in part).

cle, the important point is that process federalism arguments bolster the case against the mail fraud statute.

It is undeniable that the law of honest services comes mainly from the federal courts. It certainly does not come from the statute itself. Critics have viewed this aspect as presenting problems of vagueness[480] and separation of powers.[481] Having federal courts make basic decisions about how to conduct state and local governance also poses issues of process federalism. Federal judges are not elected. Federal juries, which play an important role in honest services decisions, are even less accountable. The extensive role of the individual United States Attorneys in deciding what conduct to pursue as a violation of the right to honest public services has also been noted.[482] Although these criticisms have usually focused on the dangers of politically-motivated prosecutions,[483] there is a process federalism dimension as well when the decision is so far removed from any congressional direction. The Justices who support *Garcia* have suggested that the Court might respond to the extreme situation of a failure in the national political process.[484] It is hard to picture the Court policing the congressional process to ensure that Congress had adequately considered the states' interests in formulating a rule of law to govern them. Under this view of federalism, however, the Court might be willing to tell Congress that it could not delegate the major task of formulation to unaccountable entities. At the very least, process federalism considerations make the constitutional status of the mail fraud statute even more problematic, especially when added to post-*Lopez* concerns. Professor Merritt analyzes the Court's jurisprudence since *National League of Cities* as articulating three approaches to protecting states from national incursions: a territorial model, a process model, and an autonomy model.[485] Under the analysis presented here, the mail fraud statute presents problems under all three.

The substantial arguments in favor of finding external limits on the statute lead to what I view as the mail fraud dilemma. On the one hand, the Court might be persuaded to strike down the honest services component of the statute in its application to state and local officials.[486] The result would certainly be a victory for state autonomy. It

480 *See* Moohr, *supra* note 2, at 187-99; Podgor, *supra* note 33, at 269-71.

481 *See* Moohr, *supra* note 2, at 178-79.

482 *See id.*

483 *See* United States v. Margiotta, 688 F.2d 108, 143 (2d Cir. 1982) (Winter, J., concurring in part and dissenting in part).

484 *See* South Carolina v. Baker, 485 U.S. 505, 512 (1988).

485 Merritt, *supra* note 43, at 1564-73.

486 *Cf.* United States v. Brumley, 79 F.3d 1430 (5th Cir.) (construing statute as inapplicable to state and local officials and reserving constitutional question), *reh'g en banc granted*, 91 F.3d 676 (5th Cir. 1996).

might also enhance accountability in that state citizens would have greater expectations that their own officials would respond to corruption and related issues.[487] It would not be the end of the world, because the Hobbs and Travel Acts[488] would still be available to federal prosecutors. Such a decision might also prod Congress to pass a more specific and comprehensive statute dealing with state and local corruption.[489]

On the other hand, federal prosecutions play an essential role in efforts to deal with the state corruption problem. The states themselves, and their citizens, have an interest in this role. One may view these prosecutions as alternatives to state mechanisms or as backstops when the latter cannot function. Federal proceedings may spur the passage of state statutes or other action. Either way, eliminating the availability of the honest services doctrine would diminish the federal role considerably. Whether these concerns would influence the Court, or whether the Court would simply be reluctant to take post-*Lopez* analysis to the point of striking down a major statute in an area of long-standing congressional concern, one should be hesitant to advocate this result. In sum, there are problems if the statute stays and there are problems if it goes. Constitutional analysis and policy considerations result in a tie. In the next Part, I suggest greater recourse to state law as a way out of this dilemma.

V
RECOURSE TO STATE LAW AS A WAY OUT OF THE DILEMMA (AND A POSSIBLE RESPONSE TO VAGUENESS CONCERNS)

A. Use Of State Law To Define "Honest Services"—Some Theoretical Observations

Many of the objections to the mail fraud statute and its role in federal anticorruption prosecutions of state and local officials focus on the key concept of "honest services."[490] A possible response to these criticisms is to utilize state law as the primary source of public

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487 *See* Moohr, *supra* note 2, at 175.

488 *See supra* text accompanying notes 108-11. Federal prosecutors would also make wider use of RICO and 18 U.S.C. § 666, as is already the case, as well as other, more general, statutes. However, limitations on the mail and wire fraud statutes would have an effect on the availability of RICO. These two statutes serve as "predicate offenses" for the crime of racketeering that RICO penalizes.

489 *See* ABRAMS & BEALE, *supra* note 59, at 248-50; Moohr, *supra* note 2, at 199-208. Consideration of any such statute would bring the federalism issues discussed here into the open.

490 *See, e.g.*, United States v. Margiotta, 688 F.2d 108, 140 (1982) (Winter, J., concurring in part and dissenting in part).

officials' duties to serve honestly.[491] There would be no free-standing federal norm to which federal authorities would give content based on federal "public policy." Instead, the mails could not be used for schemes which defraud citizens in the sense that they violate the federal policy against abetting violations of state law concerning the conduct of governmental affairs. As noted above, there is an extensive body of state law on the subject.[492] The Travel Act provides a possible analogy.[493] Federal judges can hardly claim unfamiliarity with handling state issues. In civil litigation, it is one of their major functions under the regime of *Erie Railroad Co. v. Tompkins*.[494] Recourse to state law should answer any potential process federalism objections to the mail fraud statute. The norm of conduct, usually found in statutes, regulations, and administrative decisions, would come from state organs which obviously represent state concerns. In this case, one can accurately say, quoting Justice Brennan's *National League of Cities* dissent with respect to acts of Congress, that the decisions are those "of the States themselves."[495] As far as the source of law is concerned, state defendants in a criminal case would be hard put to object to having their own law used against them. As Justice Stevens has noted, these officials are in a position where they should be expected to know that law.[496] The fact that courts can and will expect state officials to know their state law of honest services is also highly relevant in responding to the frequent vagueness objections that critics[497] and defendants[498] have raised to the statute. These objections have considerable force. Strict construction of penal statutes and other basic principles of the criminal law run counter to prosecuting a person for what turn out, after the fact, to have been less than "honest" services. On the constitutional level, these principles find their articulation in the void for vagueness doctrine.[499] This doctrine ensures that citizens

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491 Section 1346 is phrased in terms of the "right" to honest services. State law governing public officials' conduct can be viewed as creating the correlative duty that establishes the right.

492 *See supra* text accompanying notes 429-33.

493 *See* Perrin v. United States, 444 U.S. 37 (1979) (analyzing the role of state laws in Travel Act cases).

494 304 U.S. 64 (1938).

495 National League of Cities v. Usery, 426 U.S. 833, 876 (1976) (Brennan, J., dissenting), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985).

496 *See* McNally v. United States, 483 U.S. 350, 375 (1987) (Stevens, J., dissenting).

497 *See* United States v. Margiotta, 688 F.2d 108, 142 (2d Cir. 1982), (Winter, J., concurring in part and dissenting in part); Moohr, *supra* note 2, at 197-99.

498 *See, e.g.*, United States v. Waymer, 55 F.3d 564 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 1350 (1996); United States v. Sawyer, 878 F. Supp. 279 (D. Mass. 1995), *vacated*, 85 F.3d 713 (1st Cir. 1996); United States v. ReBrook, 837 F. Supp. 162 (S.D. W. Va. 1993), *modified*, 58 F.3d 961 (4th Cir.), *cert. denied*, 116 S. Ct. 431 (1995).

499 *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.9 (4th ed. 1991).

will have fair warning of consequences before they act and also seeks to contain prosecutorial discretion within defined boundaries.[500]

The courts' response to vagueness challenges aimed at the honest services requirement has been to point to the extensive body of federal judicial precedent interpreting it.[501] Perhaps it is not too much to expect potential criminal defendants to be aware of judicial precedent.[502] Furthermore, state officials, perhaps more than other citizens, may be deemed to know that federal, as well as state, criminal law can reach them.[503] The problem with "honest services" is that what it means today is no sure guide to what it can mean tomorrow. Tying the term to a particular state's law gives greater specificity and limits, as well as strengthening prior knowledge by state officials of the laws governing their actions. To the extent that vagueness challenges to the mail fraud statute remain concern, recourse to state law can provide answers to these, as well as federalism-based, objections.

In the post-*Lopez* era, however, the latter objections focus as much on the *who* as on the *what.* That is, even if state law defines honest services, federal officials are the ones enforcing it. This sets off alarms both in terms of dual federalism in general and accountability in particular. To begin with the latter, federal enforcement of state norms raises what might be called a converse *New York* problem. In that case, Justice O'Connor expressed the concern that state enforcement of federal law would leave citizens unsure as to whom to hold accountable.[504] I am proposing federal enforcement of state law, potentially raising the same concern. Here, however, the fact that the source of the law remains constant can further accountability. When federal officials enforce state law, citizens—particularly the press—will ask why their own officials are not enforcing their law. They will understand the who and the what; their focus will be on the why. I believe this focus on enforcement roles will enhance accountability at the state level. In particular, it will help to prevent situations where state governments set up elaborate anticorruption mechanisms only to have state officials enjoy de facto immunity because of nonenforcement or the prevention of enforcement.

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500 *See id.*

501 *See, e.g., Sawyer,* 878 F. Supp. at 291 (finding "that, when taken together, Section 1346 and the case law elaborating on 'intangible rights' mail fraud define the criminal offense alleged in this case with 'sufficient definiteness'").

502 *Cf.* Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973) (suggesting that officials should be aware that their conduct violates a possibly imprecise statute when their "conduct falls squarely within the 'hard core' of the statute").

503 *Cf.* McNally v United States, 483 U.S. 350, 375 n.9 (1987) (Stevens, J., dissenting) ("When considering how much weight to accord to the doctrine of lenity, it is appropriate to identify the class of litigants that will benefit from the Court's ruling today. They are not uneducated, or even average, citizens.").

504 New York v. United States, 505 U.S. 144, 168-69 (1992).

Even if one accepts this accountability argument for federal enforcement, there remains the broader issue of dual federalism. In *Gregory*, Justice O'Connor emphasized "a State's constitutional responsibility for the establishment and operation of its own government."[505] In the Eleventh Amendment context, the Court has stated that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."[506] As I have argued above, such dual federalism concerns might negate any federal criminal law dealing with general matters of state corruption.[507] Under a balancing test, the degree of intrusiveness of the mail fraud statute may make it more vulnerable than other federal statutes, even if state law is used as the reference point for honest services. In my view, however, the prospect that enhanced state accountability can flow from federal enforcement illustrates that state interests cut in both directions. In an ideal world, we would not need federal enforcement of state honest services norms. Perhaps, however, federal enforcement helps us to get there. If so, it serves short and long term goals at both levels of government.[508]

There are a number of other theoretical and practical issues concerning the use of state law that need to be addressed. The first is whether federal law in the area of governmental standards must be uniform.[509] Under the scenario set forth here, federal law embodied in numerous other anticorruption statutes would provide a national "floor."[510] Standards under these statutes would be uniform. However, this would not be the case with the mail fraud statute. It would serve in part as an incentive to greater state enforcement of state law, with federal prosecutors acting in a supplementary capacity.[511] A related issue is what to do when state law is unclear.[512] This could be a problem if, for example, state law is rarely enforced or if enforcement takes the form of negotiated, private settlements.[513] Difficult ques-

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505 Gregory v. Ashcroft, 501 U.S. 452, 462 (1991) (quoting Luther v. Borden, 48 U.S. (7 How.) 1 (1849)).

506 Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984).

507 *See supra* text accompanying notes 383-419.

508 *But see* Moohr, *supra* note 2, at 187 (arguing that federal intervention provides a short-term solution to state and local corrupt practices at the expense of society's long-term interests).

509 *See* Kurland, *supra* note 39, at 480-83 (arguing for uniform federal standards in federal anticorruption legislation and rejecting arguments for use of state law).

510 *See supra* text accompanying notes 108-15.

511 *See* ABRAMS & BEALE, *supra* note 59, at 248 (arguing that federal prosecution is a "desirable second line of defense" in corruption cases).

512 *See, e.g.*, United States v. Sawyer, 878 F. Supp. 279 (D. Mass. 1995), *vacated*, 85 F.3d 713 (1st Cir. 1996).

513 *See* MASS. SPECIAL COMM'N REPORT, *supra* note 427, at 26-27.

tions will no doubt arise, as they do in civil litigation, but the use of certification may be able to alleviate such concerns.[514]

Another problem is that federal criminal prosecutions could upset a calibrated state enforcement system which relies heavily on noncriminal sanctions.[515] State enforcement officials, and potential defendants, may be uncertain about how to proceed against a backdrop of possible federal criminal action.[516] These uncertainties can exist whether or not the federal prosecutors use state law. One answer is for federal and state officials to further establish well-understood working relationships in this area as they have in others.[517]

Admittedly, use of state law to define the "honest services" component of mail fraud will create new uncertainties. For example, it might tempt federal officials to intervene more deeply into such matters as "revolving door" ethics rules or campaign finance. The same temptation exists, however, under the existing, open-ended federal standard. In my view, use of state law has enough advantages as a matter of federalism that it is worth a try. Examination of the cases reveals the surprising conclusion that there is substantial support for this proposal in existing practice.

B. Empirical Support for the Use of State Law—The Cases

The federal cases deciding the scope of the honest services doctrine under the mail fraud statute, as well as the wire fraud statute, demonstrate an extraordinary degree of richness and complexity. Rather than attempt to group them into neat categories, I find it most helpful to analyze them as points on a spectrum. At one end—the "federal law" end—are decisions that validate the standard view that the only law in question is federal.[518] These cases either do not dis-

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514 *See Sawyer*, 878 F. Supp. at 293 (noting defendant's argument that court should certify certain questions of interpretation of Massachusetts gift statutes but declining to so rule).

515 *See* ABRAMS & BEALE, *supra* note 59, at 245 (analyzing penalty structures); *cf.* MASS. GEN. LAWS ANN. ch. 268(B), §§ 1-8 (West 1996) (requiring financial disclosure of certain public officials and employees and establishing state ethics commission for civil enforcement of conflict of interest law).

516 *See* ABRAMS & BEALE, *supra* note 59, at 248; *see also infra* text accompanying note 623 (discussing the federal common law approach to the "*Sawyer* problem"); *cf.* United States v. Brumley, 79 F.3d 1430, 1433 (5th Cir.) (noting federal defendant's argument that alleged conduct would be a misdemeanor under state law but was prosecuted as a federal felony), *reh'g en banc granted*, 91 F.3d 767 (5th Cir. 1996).

517 *See* Stephen Kurkjian & Judy Rokowsky, *State Planning Civil Suit Against Flynn Over Funds*, BOSTON GLOBE, Feb. 2, 1996, at 1 (reporting on a joint federal-state investigation of former city administration). There have been numerous recent examples of close federal-state law enforcement cooperation in such areas as drug trafficking and street gang violence. One must recognize that developing such relationships becomes much more difficult when the state or local political establishment is the entity under investigation.

518 *See, e.g.*, United States v. Bryan, 58 F.3d 933, 940 (4th Cir. 1995); United States v. Silvano, 812 F.2d 754, 758-59 (1st Cir. 1987); United States v. McNeive, 536 F.2d 1245,

cuss state law[519] or dismiss the need to consider it. In *United States v. States*,[520] for example, the court rejected federalism concerns over dealing with state electoral issues,[521] and declared that the statute's goal is to prevent the Postal Service from being used to carry out a fraudulent scheme "regardless of whether it happens to be forbidden by state law."[522] The opinion described the role of the federal courts in the following terms:

> "The crime of mail fraud is broad in scope. . . . The fraudulent aspect of the scheme to 'defraud' is measured by a nontechnical standard. . . . Law puts its imprimatur on the accepted moral standards and condemns conduct which fails to match the 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of the members of society.'"[523]

At the other end of the spectrum are cases in which state law plays the primary, even the only, role in determining the scope of honest services. These cases represent a significant, albeit often implicit, judicial recognition of the serious federalism issues discussed in this Article. In at least one case, the recognition was explicit. In *United States v. Schermerhorn*,[524] Judge Goettel of the Southern District of New York expressed his "federalist concerns" that federal juries are being asked to make essentially "moral judgments about an official's behavior."[525] He called for limiting the statute's use to cases of conduct deemed illegal under state law.[526] Because of the importance of these cases, I will discuss the facts and analyses of several of them.

In *Schermerhorn*, the defendant was a state senator charged with receiving and failing to disclose illegal campaign contributions from an underworld figure. In denying a motion to dismiss mail fraud changes, the court emphasized that the conduct was illegal under the New York Election Law.[527] The opinion is somewhat ambiguous, however, as to whether state law is the sole source of the standard of conduct.[528]

1247-49 (8th Cir. 1976); United States v. Isaacs, 493 F.2d 1124, 1150-51 (7th Cir. 1974); United States v. States, 488 F.2d 761, 764-65 (8th Cir. 1973).

519 *See, e.g., Silvano*, 812 F.2d 754, 758-59. The conduct described in *Silvano* would have raised serious questions under Massachusetts conflicts-of-interest law.

520 488 F.2d 761 (8th Cir. 1973).

521 *See id.* at 766-67.

522 *Id.* at 767.

523 *Id.* at 764 (quoting Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967) (alterations in original)).

524 713 F. Supp. 88 (S.D.N.Y. 1989).

525 *Id.* at 91 n.4.

526 *Id.*

527 *See id.* at 91 n.4.

528 *See id.* at 88-89 (discussing good government and loss of salary theories).

State law also constituted the primary frame of reference in *United States v. ReBrook*,[529] a wire fraud prosecution based on securities trading by a state official whose position gave him inside knowledge.[530] In dealing with the honest services issue, the district court relied on the West Virginia Governmental Ethics Act,[531] both to establish that the defendant was a public employee and to determine his fiduciary obligations.[532] Again the opinion is ambiguous in that it leaves open the possibility that the defendant's duty of honest services might also flow from his ethical responsibilities as an attorney or "his inherent responsibilities as a West Virginia public employee."[533] This language suggests the possibility of a federal common law approach.[534]

The Massachusetts District Court left no such ambiguity in *United States v. Sawyer*.[535] The theory of the case was, in part, that a lobbyist had engaged in a scheme to deprive Massachusetts citizens of their right to the honest services of their legislators by giving them gratuities.[536] The district court's analysis of the fiduciary duties of Massachusetts legislators is based solely on state statutes and legislative rules.

Another case that appears to rest solely on state law is *United States v. D'Alessio*.[537] This complex case involved alleged misconduct by county sheriffs. The district judge dismissed honest services charges, which were based on receipt of gratuities. After an extensive review of state judicial opinions, statutes, administrative provisions, and rules of court,[538] the judge concluded that a state court "could well decide that the Rule does not apply to county sheriffs," and applied the rule of lenity.[539]

A number of important cases fall in the middle of the spectrum. Courts often purport to decide an honest services issue as a matter of federal law, but end up utilizing state law as well. In *United States v.*

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529 837 F. Supp. 162 (S.D. W. Va. 1993), *modified*, 58 F.3d 961 (4th Cir.), *cert. denied*, 116 S. Ct. 431 (1995).

530 *See id.* at 164.

531 *See id.* at 170 (citing W. VA. CODE §§ 6B-1-1 to 5 (1993)).

532 *See id.* (asserting that "when the Legislature sought to promote integrity and impartiality in governmental process by enacting the Ethics Act, it did not intend to exempt from the Act's constraints those individuals, such as Defendant, whose terms of service may have lacked a few emoluments of state employment").

533 *Id.*

534 For example, the court could use the Model Rules of Professional Conduct as a source of law, regardless of whether West Virginia had adopted them.

535 878 F. Supp. 279 (D. Mass. 1995), *vacated*, 85 F.3d 713 (1st Cir. 1996).

536 *See id.* at 281.

537 822 F. Supp. 1134 (D.N.J. 1993).

538 *See id.* at 1146-48.

539 *Id.* at 1143. *But see* United States v. Faser, 303 F. Supp. 380, 384-85 (E.D. La. 1969) (holding that an agent of a state has no right to gifts or gratuities as an agent absent an agreement).

Margiotta,[540] the majority invoked state law to alleviate federalism concerns raised by the dissent.[541] Judge Kaufmann asserted stoutly that "we need not examine state law,"[542] and then went on to conclude that the defendant's acts violated New York law as well as federal law.[543] Courts in other cases have looked to state sources to help determine the scope of the defendant's duties. A classic example is *United States v. Mandel*,[544] sometimes cited for the proposition that federalism concerns should not play a role.[545] In discussing the duties of the defendant, the Governor of Maryland, the court began with a standard federal common law analysis.[546] It emphasized judicial power and the view that state law is not controlling.[547] However, in analyzing the defendant's obligation to disclose his financial dealings, the court cited the Maryland Constitution and a state supreme court case.[548]

One can find this mixture of state and federal law in defining the defendant's duty as early as 1941 in *Shushan v. United States*.[549] *Shushan* is the case which purportedly established that federal law is the relevant law.[550] Yet it examined in some detail the bearing of state statutory law concerning conflicts of interest.[551] State law crops up in other cases in a variety of contexts. Courts have looked to state law to establish a defendant's duty of disclosure.[552] Prosecutors have used state law to establish that the defendant acted willfully.[553] And, reports suggest that indictments frequently make specific reference to relevant state law.[554]

As the discussion of the judicial approaches indicates, the role of state law in honest services cases is in flux. The recent decision by the

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540 688 F.2d 108 (2d Cir. 1982).

541 *See id.* at 143 (Winter, J., concurring in part and dissenting in part).

542 *Id.* at 124.

543 *See id.* at 124-26; *see also* United States v. Brennan, 938 F. Supp. 1111, 1119 (E.D.N.Y. 1996) (describing Second Circuit approach in mail fraud fiduciary duty cases as "applying federal law, drawing however, on the law of various states and the common law").

544 591 F.2d 1347 (4th Cir.), *aff'd en banc per curiam*, 602 F.2d 653 (4th Cir. 1979).

545 *See, e.g.* United States v. Silvano, 812 F.2d 754, 758 (1st Cir. 1987).

546 *See Mandel*, 591 F.2d at 1357-61.

547 *See id.* at 1361.

548 *See id.* at 1363 (asserting that "[s]o far as relevant in this case, the Governor of the State of Maryland is trustee for the citizens and the State of Maryland and thus owes the normal fiduciary duties of a trustee, e.g., honesty and loyalty") (citing MD. CONST. Declaration of Rights art. 6; Kerpelman v. Board of Pub. Works, 276 A.2d 56, 61, *cert. denied*, 404 U.S. 858 (1971)).

549 117 F.2d 110 (5th Cir.), *cert. denied*, 313 U.S. 574 (1941), *amended by* United States v. Cruz 478 F.2d 408 (5th Cir. 1973).

550 *See Mandel*, 591 F.2d at 1363 (citing *Shushan*).

551 *Shushan*, 117 F.2d at 120.

552 *See* United States v. Bush, 522 F.2d 641, 645 (7th Cir. 1975).

553 *See* United States v. Keane, 522 F.2d 534, 553-57 (7th Cir. 1975); *see also Shushan*, 117 F.2d at 120.

554 *See, e.g., Mandel*, 591 F.2d at 1363; United States v. McNeive, 536 F.2d 1245, 1247 n.2 (8th Cir. 1976).

Court of Appeals for the First Circuit in *United States v. Sawyer*[555] may compound the uncertainty. The defendant, a lobbyist, was convicted of mail fraud, wire fraud, and other related charges.[556] The lower court accepted the prosecution's theory that the defendant's violation of the Massachusetts gift and gratuities laws sufficed to show a scheme to deprive the state's citizens of the right to their legislators' honest services.[557] The Court of Appeals, however, vacated the conviction. As a general matter, the opinion expressed reservations about the use of state law in honest services cases, citing the "complications" it might cause.[558] The court was particularly troubled by the theory that a violation of state law alone could suffice to establish a federal crime: "[t]o allow every transgression of state governmental obligations to amount to mail fraud would effectively turn every such violation into a federal felony; this cannot be countenanced."[559]

On the other hand, the court did not entirely rule out some use of state law in circumstances like those in *Sawyer*. However, in addition to violation of the state statute, it required the jury to find intent "*to influence or otherwise improperly affect the official's performance of duties.*"[560] This hybrid requirement—federal intent to violate a state duty—could represent the kind of "complication" of which the court warned. In fact, the court appears to have viewed the existence of state law as irrelevant. As long as the defendant gave gifts with an intent "to influence or otherwise improperly affect the official's performance of duties," the defendant committed fraud for purposes of a federal criminal prosecution.[561] Indeed, the court suggested the insignificance of state law early in its analysis,[562] and had previously placed itself at the federal law end of the spectrum.[563]

Sawyer cuts both ways with regard to this Article's arguments. Federalism concerns may be the source of the First Circuit's concern

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555 85 F.3d 713 (1st Cir. 1996).

556 The prosecution also charged a violation of the Travel Act on the theory that violation of the state gratuities statute constituted "bribery" under the Travel Act. The court of appeals appeared to agree with this theory. *See id.* at 734 n.19. This interpretation of the Act is discussed *supra* text accompanying notes 459-61. However, the court vacated the conviction on this ground as well, insisting on a "protective instruction" that the defendant's intent was to "cause the recipient to alter her official acts." *Id.* at 741.

557 *See* United States v. Sawyer, 878 F. Supp. 279, 289-90 (D. Mass. 1995) (denying motion to dismiss indictment), *vacated*, 85 F.3d 713 (1st Cir. 1996).

558 *Sawyer*, 85 F.3d at 726.

559 *Id.* at 728.

560 *Id.* at 729.

561 The opinion makes clear the federal nature of the issue. "[F]or the *federal* honest services fraud to be proven, the defendant must have the intent to affect a legislator's performance of an official act and not merely to make payments in excess of some state specified limitations." *Id.* at 732 (emphasis added).

562 *See id.* at 726.

563 *See, e.g.* ,United States v. Silvano, 812 F.2d 754, 758-59 (1st Cir. 1987).

for narrowing the scope of the mail fraud statute. The court's approach is to require a certain degree of perversion of the political process before a federal criminal violation is found. This may be sound policy, although there is some analytical difficulty in claiming that violations of conflict of interest standards do not deprive the public of its right to honest services. However, *Sawyer* is a partial setback for the state law approach advocated here. The court is correct that federal law need not be compelled by state conceptions of official duty in deciding what to criminalize. The harder question is whether federal law can delineate state officials' duties of honest services without reference to state conceptions. *Sawyer*, although ambiguous, indicates an affirmative answer. If the government had not brought state law into the case, the judges would not have either.[564]

Decisions from other courts manifest a range of views on the issue. The various forms of reference to state law in these decisions represent more than lawyer-like concern with touching all the bases. It is significant that even some federal courts that accept the doctrinal premise that state law is irrelevant utilize it anyway. State law helps to anchor a relatively open-ended exercise of judicial power and serves as an implicit recognition of federalism concerns. Recent cases at the "state law" end of the spectrum may represent a trend of increased judicial awareness of the federalism dimensions of honest services prosecutions.[565] This approach offers a way out of the mail fraud dilemma, which responds to the constitutional dynamics of the post-*Lopez* era. The question then becomes how to move the law further in this direction.

C. Toward Greater Use of State Law to Define Honest Services—Clear Statement Analysis or Federal Common Law?

In this subsection, I discuss two approaches. One would be for the federal courts, and ultimately the Supreme Court, to read § 1346[566] as requiring that state law establish the scope of honest services whenever the defendant is a state or local official. Courts could

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564 The prosecution may have thought that it had to utilize the state law provisions because they imposed duties on the private parties. There are a limited number of circumstances in which courts view private citizens as public fiduciaries, *see, e.g.*, United States v. Margiotta, 688 F.2d 108, 121-22 (2d Cir. 1982), but lobbyists do not seem to fall within these exceptions. Sawyer, however, would not need to have any honest services obligations of his own in order to deprive citizens of the right to their legislators' honest services. The question would still remain as to whether state law was relevant to these services or whether federal law could control the entire case.

565 *See supra* text accompanying notes 524-39.

566 18 U.S.C. § 1346 (1994).

reach this conclusion through use of the "clear statement" rule.[567] Under this approach, "only an extremely well-targeted statutory statement [will] permit the Court to apply 'intrusive' federal statutes against the states."[568] Because § 1346 does not specify use of a federal standard of honest services, a court would presume that Congress did not intend to displace state law. As noted in the discussion of *Gregory v. Ashcroft*,[569] the Court has relied on the "clear statement" rule to foster a strong pro-state view of federalism. The rule is clearly grounded in constitutional concerns.[570] The conservative members of the Court may have seized upon it in order to counterbalance *Garcia*'s rejection of substantive limits on federal power.[571] Moreover, the rule certainly fits comfortably within the post-*Lopez* tilt toward re-establishing those limits.

Applying the "clear statement" rule makes sense in the general context of the mail fraud statute. *United States v. Bass*,[572] one of the important early articulations of the rule, rests on a desire to limit the scope of federal criminal law.[573] Much of the rule's development has occurred in Eleventh Amendment litigation.[574] These cases involve using federal judicial power against states, which is somewhat analogous to the problem presented in mail fraud cases. Although the Eleventh Amendment decisions permit damage suits against individual officers that might be compared to the criminal prosecutions at issue here,[575] those suits often rest on the Fourteenth Amendment. This grant of national authority over states is not present in the mail fraud context.[576] The general thrust of the Eleventh Amendment cases—limiting exercises of federal judicial power that infringe on state sovereignty—is certainly on point.[577] More specifically, Justice

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567 *See generally* Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959 (1994) (advocating recognition of the essential role of "clear statement" rules in the Supreme Court's jurisprudence).

568 William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law As Equilibrium*, 108 HARV. L. REV. 26, 82 (1994).

569 501 U.S. 452 (1991). *See supra* Part IV.B.4.

570 *See* Note, *supra* note 567, at 1962-63.

571 *See id.* (noting tension between *Garcia* and "clear statement" rule).

572 404 U.S. 336 (1971).

573 *See id.* at 349.

574 *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985).

575 *See* CHEMERINSKY, *supra* note 338, § 7.5.2.

576 The typical damages suit would be brought under 42 U.S.C. § 1983, a statute passed to enforce the Fourteenth Amendment. Of course, the analysis here assumes that there is no separate national power over the operations of state government, such as that suggested by Professor Kurland's reading of the Guarantee Clause. Kurland, *supra* note 39, at 432.

577 Moreover, the analysis in this Article reflects the belief that a federal criminal prosecution of a state official for dishonest services intrudes upon state sovereignty. Thus, I reject the reasoning that the prosecution does not affect the state because it is brought against the official. *See* United States v. Thompson, 685 F.2d 993, 1001 (6th Cir 1982) (stating that prosecutions of individuals cannot affect "States as States").

Thomas advocated use of the "clear statement" rule in Hobbs Act suits against state and local officials.[578]

The Court of Appeals for the Fifth Circuit recently used the clear statement approach to invalidate the wire fraud conviction of a state official.[579] The court went further than the resolution suggested, however, by holding that the reference in § 1346 to "the intangible right of honest services" does not apply to the services of state and local officials.[580] The result appears to be that these officials cannot be prosecuted for mail fraud unless the prosecution can show a scheme involving property rights.[581] Indeed, the opinion's clear implication is that § 1346 does not apply to *private* defendants without a similar showing.[582] In the Fifth Circuit, therefore, *McNally* is apparently still good law and § 1346 may be a nullity.

The court reached this somewhat surprising result by first finding ambiguity in the words "whoever" and "another"—the operative terms of §§ 1341 and 1346 of Title 18.[583] It reasoned that "whoever" could not mean either a governmental entity or "the citizens of a state as a body politic."[584] "Another" might mean the same thing as "whoever." Presumably "another" thus does not mean whatever "whoever" does not.[585] The point seems to be that the language does not fit naturally in the governmental services context. Whether the court found an ambiguity or went to some length to create one is open to debate.[586] Regardless, the court concluded that "the language of § 1346 is not

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It is true that in civil actions seeking injunctive relief against state policies the doctrine of *Ex parte Young*, 209 U.S. 128 (1908), permits a distinction between suits brought directly against a state and suits against state officials. I see no reason to extend the *Young* fiction to corruption prosecutions under federal law.

578 *See* Evans v. United States, 504 U.S. 255, 289-92 (1992) (Thomas, J., dissenting).

579 *See* United States v. Brumley, 79 F.3d 1430, 1439 (5th Cir.), *reh'g en banc granted*, 91 F.3d 676 (5th Cir. 1996).

580 *Id.* at 1437, 1440 (quoting 18 U.S.C. § 1346 (1994)).

581 *See id.* at 1434 (recognizing that under *McNally* and *Carpenter v. United States*, 484 U.S. 19, 26-28 (1987), "both tangible and intangible property rights are protected by the mail and wire fraud statutes").

582 *See id.* (noting that *McNally* "pull[ed] the rug out from under [private sector cases]"). *But see* United States v. Gray, 96 F.3d 769 (5th Cir. 1996) (applying statute in private section context).

583 *See id.* at 1435. Section 1341 refers to the use of the mails by the following: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises . . . ." 18 U.S.C. § 1346 (1994). Section 1346 provides that "[f]or the purposes of this Chapter, the term 'scheme or artifice to defraud includes a scheme or artifice to defraud another of the intangible right of honest services." 18 U.S.C. § 1346 (1994).

584 *Brumley*, 79 F.3d at 1435.

585 *See id.*

586 *See id.* at 1452 (Wood, J., dissenting) (describing majority's reading as "restrictive" and concluding that an "ordinary" reading of § 1346 can include "a state citizen where the perpetrator of the fraud is a governmental official acting in his or her official capacity").

sufficiently clear on its face so as to eliminate the need for a look at the legislative history of the passage of § 1346."[587]

In dissecting the legislative history, the court may be on surer ground, although its opinion does not reflect the general view.[588] There were no committee reports or floor debates.[589] The House appeared reluctant to adopt any of the Senate's specific proposals for broad anticorruption legislation.[590] The court also showed strong concern for the constitutional dimensions of honest services prosecutions. It emphasized repeatedly the federalism basis of *McNally*.[591] Surprisingly, the majority opinion did not cite any of the other federalism decisions discussed here. However, it referred to the constitutional issue that would arise if Congress did reach out unambiguously to address the general issue of misconduct by state and local officials.[592]

If *Brumley* survives,[593] its implications are far-reaching. First, it would eliminate mail fraud prosecutions of state and local officials under the honest services doctrine. In that situation, prosecutors might argue creatively that dishonest conduct had led to property loss.[594] Secondly, the status of private sector honest services prosecutions would be uncertain at best.[595] Third, and principally, *McNally* would remain good law. Indeed, at one point, the court stated that Congress could not overrule it.[596]

Like the First Circuit in *Sawyer*, the Fifth Circuit was concerned with the extraordinarily broad reach of honest services prosecutions of state and local officials. The two courts, however, adopted sharply

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587 *Id.* at 1435.

588 *See, e.g.*, Podgor, *supra* note 33, at 228 (explaining that the amendment "effectively voided the *McNally* holding").

589 *See Brumley*, 79 F.3d at 1346.

590 *See id.* at 1438-39. This inaction may reflect satisfaction with the extent to which § 1346 covers the problem, as well as other doubts about a broader statute.

591 *See id.* at 1433-34, 1436.

592 *See id.* at 1442.

593 The decision was vacated and rehearing en banc was granted on July 17, 1996. 91 F.3d 676 (5th Cir. 1996). At least two federal courts have disagreed with the *Brumley* analysis. *See* United States v. Paradies, 98 F.3d 1266, 1283 (11th Cir. 1996); United States v. Frega, 933 F. Supp. 1536 (S.D. Cal. 1996). The Supreme Court may well decide the ultimate issue in *Brumley*, especially if it perpetuates this conflict. The case could become the Fifth Circuit's next *Lopez*.

594 *See* McNally v. United States, 483 U.S. 350, 377 n.10 (1987) (Stevens, J., dissenting).

595 *See Brumley*, 79 F.3d at 1434 (noting effect of *McNally* on both public and private sector cases); *see also* United States v. Gray, 96 F.3d 769, 773-74 (5th Cir. 1996) (applying honest services statute to private sector breach of fiduciary duty).

596 *See Brumley*, 79 F.3d at 1437 ("[W]e know of no principle of constitutional law which contemplates that the Congress can by simple legislative fiat overrule, overturn, nullify or render ineffective a decision of the Supreme Court."). Perhaps one should place emphasis on the phrase "by simple legislative fiat" as an indication that Congress had not done the job the right way. *But see id.* at 1440 (expressing disapproval of the theory of nullification by statute).

different approaches to limiting the statute. The First Circuit focused on the severity of the defendant's conduct, and its impact on the political process, as a limiting technique. The *Brumley* panel essentially nullified the statute in the absence of a clearer statement from Congress. Whether the Fifth Circuit en banc adheres to this result will be of great importance and may set the stage for Supreme Court consideration of § 1346. The Fifth Circuit may seek a middle ground under which the statute applies to private action but not to state and local officials. Private actors would be liable in the somewhat nebulous area in which violations of the right to honest services do not rise to the level of deprivations of property. This approach would give the statute some force, although an asymmetrical application would result. This reading would be an alternative form of clear statement analysis, analogous to the basic Eleventh Amendment principle that generally-phrased statutes do not, in that context, apply to states.

My clear statement proposal is even more modest: give effect to § 1346, but construe "the intangible right of honest services" to refer to duties created by state law when public officials are defendants.[597] There are, however, compelling reasons not to try any version of the clear statement finesse here. This technique pushes judicial power to its limits. As Professors Eskridge and Frickey note, it is "institutionally risky."[598] The Court has already utilized clear statement analysis once with respect to the mail fraud statute in *McNally*.[599] To do so again—to say that Congress did not get the message and must re-rewrite the statute—might push judicial authority beyond its limits. An even more fundamental problem is that it is not obvious that the statement in § 1346 is unclear. The Court put Congress on notice that the honest services cases decided in the lower courts led to "involv[ing] the Federal Government in setting standards of disclosure and good government for local and state officials."[600] It also indicated that Congress could act without regard to state law. Congress responded by passing § 1346, adopting the honest services standard. This is a term of art; *McNally* seems to make its meaning clear.

It is possible to criticize Congress for not adequately considering state interests in the passage of § 1346,[601] but that is not the relevant inquiry. On the other hand, there is some legislative history that sup-

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597 It must be noted that this proposed reading also raises problems in the case of private sector honest services defendants. Although principles of federalism are applicable to federal regulation of private conduct, they are weaker than in the context of regulating public officials.

598 Eskridge & Frickey, *supra* note 568, at 82.

599 McNally v. United States, 483 U.S. 350, 359-60 (1987).

600 *Id.* at 360.

601 *See* Moohr, *supra* note 2, at 208.

ports the view that it was passed to overrule *McNally*.[602] However, clear statement directs attention away from that history toward "evidence of congressional intent . . . both unequivocal and textual."[603] Thus, neither process nor history is dispositive. The question is whether § 1346 meets the Court's standard. It does not mention suits against state and local officials; the drafting could be clearer.[604] Still, it would seem a misuse of judicial authority to ignore the context in which Congress passed § 1346. Virtually all lower courts have concluded that Congress did intend to reinstate the honest services doctrine.[605] Indeed, one circuit court has described § 1346 as the sort of clear statement Congress sought in *McNally*.[606]

Does rejection of the clear statement alternative mean that the Court will have to bite the constitutional bullet and consider seriously the arguments against the validity of the honest services statute as applied to state and local officials?[607] Perhaps that result is inevitable, but I believe that courts can avoid it and have the best of both worlds by incorporating state law under a modified federal common law approach. This is the second possible way to achieve greater use of state law. It assumes that some degree of federal common law in the criminal context is permissible. One can view a broad statute such as § 1346 as congressional authorization to fashion it within the parameters of the state statutory terms.[608] The concept of "federal common law" need not mean a total absence of state law. Lower courts have already utilized state law in honest services cases, but they have not generally been explicit about how they reached this result. In the private civil law context, courts have extensively considered the role of

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602 *Id.* at 169 (referring to Representative Conyers' assertion, 134 CONG. REC. H11, 251 (daily ed. Oct. 21, 1988), that § 1346 "restores the mail fraud provision to where [it] was before the *McNally* decision").

603 Dellmuth v. Muth, 491 U.S. 223, 230 (1989).

604 *See generally* ABRAMS & BEALE, *supra* note 59, at 137-38 (describing congressional response to *McNally*).

605 *See* United States v. Bryan, 58 F.3d 933, 940 n.1 (4th Cir. 1995) (citing cases); *see also* West Virginia Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 115 (1991) (Stevens, J., dissenting) (noting that *McNally* was "quickly corrected" by Congress).

606 *See Bryan*, 58 F.3d at 940 n.1.

607 In this Article, I have emphasized the federalism arguments. However, the issues of vagueness and improper delegation are also important. My colleague Sharon Beckman has been very helpful in discussing the latter issue with me.

608 *See* Durland v. United States, 161 U.S. 306, 312-15 (1896) (interpreting mail fraud statute to permit broad judicial role in defining "fraud"). Indeed, the judicial approach described in *United States v. States*, 488 F.2d 761, 766-67 (8th Cir. 1973), is a good example of federal common law formulation. The relationship of statutory interpretation to federal common law is a recurring theme in federal courts scholarship. *See e.g.*, HART & WECHSLER, *supra* note 56, at 755 ("Determining the proper role of federal common law is all the more difficult because it cannot be sharply distinguished from statutory or constitutional interpretation. As specific evidence of legislative purpose with respect to the issue at hand attenuates, interpretation shades into judicial lawmaking on a spectrum.").

state law in federal common law adjudication. Judges in these cases must first find authority to fashion federal common law, usually in a statute or in the Constitution itself.[609] The question then arises as to whether state law can play a role.

A civil case that provides possible guidance is *United States v. Kimbell Foods, Inc.*[610] At issue were the rights of the United States, as creditor, against the rights of other creditors of borrowers in default. Because the underlying loans that were subject to the claims came from federal entities, the Court held that federal law controlled issues relating to those loans. However, it also held that federal courts should "adopt state law as the appropriate federal rule for establishing the relative priority of . . . competing federal and private liens."[611] The Court saw no need for uniformity. Rather, it emphasized the importance of "intricate state laws of general applicability on which private creditors base their daily commercial transactions."[612] The same analysis can apply to mail fraud cases. State law of honest services exists and public actors rely on it in fashioning their governmental conduct.[613] Federalism does not require uniformity.

The issue that *Kimbell Foods* raises is a recurring one in the civil context,[614] and it can occur in the criminal context as well. The Federal Criminal Drug Forfeiture Statute[615] (as well as its civil counterpart)[616] provides for the forfeiture of "property" related to drug crimes such as the instrumentalities or the proceeds of an offense.[617] It provides for this forfeiture "irrespective of any provision of State law,"[618] and it contains a somewhat general definition of property.[619]

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609 *See, e.g.*, Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). *See generally* CHARLES A. WRIGHT, LAW OF FEDERAL COURTS 412-14 (5th ed. 1994) (discussing *Clearfield* and the making of "federal common law"). The mail fraud statute with the honest services amendment can, as noted, be viewed as a delegation to fashion federal common law. For a general discussion of delegated authority to develop federal common law in the criminal context, see Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 S. CT. REV. 345. Professor Kahan discusses federal fraud statutes as an example of such delegation. *Id.* at 373-78; *see also id.* at 365-66 (discussing federal defendant's awareness of state law).

610 440 U.S. 715 (1979).

611 *Id.* at 717.

612 *Id.* at 729.

613 *See supra* text accompanying notes 429-33.

614 *See, e.g.*, United States v. Yazell, 382 U.S. 341, 348-50 (1966); DeSylva v. Ballentine, 351 U.S. 570, 580-82 (1956). *See generally* Wright, *supra* note 609, at 411-21 (discussing the *Erie* Doctrine and the making of "federal common law").

615 21 U.S.C. § 853 (1994).

616 *See* 21 U.S.C. § 881 (1994).

617 *See* 21 U.S.C. § 853(a).

618 *Id.*

619 21 U.S.C. § 853(b). This provision states, in relevant part, that "[p]roperty subject to criminal forfeiture . . . includes (1) real property, including things growing on, affixed to, and found in land; and (2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities."

Not surprisingly, a number of cases involving real estate have raised difficult issues of who owned the "property" in question. So far, the lower courts have tended to look to state law for answers.[620] This result seems consistent with federalism values. Federal law decides when a defendant's property is subject to forfeiture; state law determines whose property it is. As with *Kimbell Foods*, the analogy to the honest services problem is not complete. In the lien and forfeiture contexts, federal law provides the basic norm, while state law guides one portion of the problem. In the honest services context, I am proposing judicial borrowing of state law, without statutory direction,[621] to define the norm itself. Some may see this as an abdication of national power.[622] However, if one accepts the analysis offered in this Article, my proposal should be viewed as a healthy advance for federalism.

Finally, two related questions must be addressed briefly: the *Sawyer* problem of state statutes whose breach federal law may not choose to criminalize, and the possibility of inadequate or nonexistent state law. Examination of the First Circuit's opinion in *Sawyer* suggests that in many instances federal courts may not view state requirements as meriting federal criminal enforcement. Here again, federal common law points the way: if a federal court does not feel that the use of state law is appropriate, it need not borrow it. There is a key difference, however, between this modified federal common law and the *Sawyer* approach. The court is not free to fashion a *federal* law of honest services without a specific grounding in state-created duties.[623] Whether or not there is a violation of these duties is the first step in honest services analysis. What happens, however, if there is no state law to borrow, or if it seems inadequate in a given case?[624] One answer is that that is the price we pay for federalism. States may fail. Nonenforcement leaves the matter to their political processes. The borrowing solution keeps the matter open. If federal officials can convince a federal court that a particular situation is so offensive to federal inter-

620 *See, e.g.*, ABRAMS & BEALE, *supra* note 59, at 885-86 (discussing the use of state law in federal forfeiture actions); Kenneth J. Rossetti, Defining the Property Interest in the Federal Criminal Drug Forfeiture Statute, 21 U.S.C. § 853: Implications for Choice of Law and for Federalism (1995) (unpublished seminar paper, Boston College Law School); *see also* United States v. 92 Buena Vista Ave., 507 U.S. 111, 141-42, (1993) (Kennedy, J., dissenting) (speculating "whether the controlling law for transferring and tracing property rights of the United States . . . is federal common law").

621 By contrast, the Travel Act, 18 U.S.C. 1952(b) (1994), explicitly authorizes the use of state law.

622 *See* Kurland, *supra* note 39, at 479-80.

623 There remains the analytical problem that the defendant would have denied the public of its right to honest services by violating state laws defining that right, but would not be subject to punishment under the federal honest services statute. The answer is to be found in the word "federal." State sanctions for state duties remain available.

624 For example, the defendant might have engaged in a complex course of conduct, of which state law addresses only a part.

ests that the court should fashion a federal rule that is otherwise unavailable from another federal statutory source, federalism may well permit this result. My preference is to avoid it, at least as long as possible.

CONCLUSION

Federalism is one of those concepts that just won't go away.[625] *Lopez* symbolizes the current Court's commitment to federalism. The extent to which the case will be a source of new doctrine is not yet clear. However, its significance extends beyond the Commerce Clause to contexts where, as an initial matter, federal power seems present. Even here, the Court may find external federalism-based limits on the exercise of that power. It seems wise in the post-*Lopez* era to reexamine long-held assumptions about the national role. Those assumptions are particularly open to question when the national government is regulating states and their subdivisions.

One area for concern is the federal prosecution of state and local officials for corrupt governmental practices. This is a well-established activity of the national government. So far, the courts have accepted it. I foresee a change, however. These prosecutions place states under a form of federal tutelage more suitable to political subdivisions than to somewhat autonomous co-equal sovereigns. In this Article I have examined the reasons why prosecutions under the mail fraud statute are particularly problematic. That statute incorporates a broad right to "honest services." It falls to federal courts, prosecutors, and juries to define the contours of that right.

In my view, these prosecutions raise serious federalism questions, particularly in the post-*Lopez* era. Federal enforcement of this wide-ranging federal norm is likely to encounter constitutional challenges. Perhaps the Court will face the issue head on and resolve it. I believe, however, that the federalism problem can be greatly alleviated by looking to state law to define the content of honest services. Courts might apply clear statement analysis to read the statutory reference to honest services as requiring use of state laws. I believe that it is preferable to use a modified federal common law approach that requires the existence of a state law duty as a first step in honest services analysis. Examining the cases reveals that there is considerable precedent for this approach. Federalism objections have less force when federal courts use state law. There remains the question of the desirability of federal enforcement. In the long run, state enforcement of state law

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625 For an excellent introduction to the federalism debate, see Symposium: *Federalism's Future*, 47 VAND. L. REV. 1205 (1995), especially Larry Kramer's contribution, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1995).

is the optimal approach. In the short run, however, federal enforcement may be a means of getting there.